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Free Conscience in Decline: The Insignificance of the Free Exercise Clause and the Role of the Religious Freedom Restoration Act in the Wake of Hobby Lobby

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FREE CONSCIENCE IN DECLINE: THE INSIGNIFICANCE OF THE FREE EXERCISE CLAUSE AND THE ROLE OF THE RELIGIOUS FREEDOM RESTORATION ACT IN THE WAKE OF *HOBBY LOBBY*

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"Once established, religious intolerance tends to be self-sustaining . . . . So every generation must nurture and pass on the commitment to religious liberty. Grappling with the difficult and controversial issues of religious liberty is part of that responsibility."[1]

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1. Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 451 (1986).

The current interpretation of the Free Exercise Clause is entirely severed from its historical moorings, and modern jurisprudence takes no account of the reverence to which its authors attributed it.[2] There exists today only a disparate reflection of the traditional right of free exercise of religion under the First Amendment. That reflection is largely devoid of respect for individual liberty of conscience. Consequently, those who would assert such rights, once inviolate, now must look elsewhere for what should be constitutional protection.

The central infirmity of the Free Exercise Clause stems from a lack of recognition of its historical purpose and pedigree. Its present scope is largely confined to the protection of belief, but the Clause was never meant to be so limited.[3] The Founder's Free Exercise Clause was a robust

2. Michael McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000) [hereinafter McConnell, *First Freedom*].

3. *See generally* Elane Photography, LLC v. Willock, 284 P.3d 428, 444 (N.M. Ct. App. 2013) (stating that the owner of a commercial photography business is free to believe

protection for religiously motivated *conduct*, as the text implies.[4] "In the Founding Era, religious beliefs, and their expression in a myriad of ways, were assumed to be an integral part of individual and communal life. Freedom — to object, to dissent, to express religious and conscientious belief — clearly was accepted and protected."[5] For that generation, a choice between the freedom to believe and the freedom to act was essentially no choice at all.[6]

Unfortunately, the modern Free Exercise Clause doctrine favors a progressive interpretation concerned more with efficiency and practicality than meaningful protection of conscience. Individual liberty of conscience, once present in the American legal understanding of free exercise,[7] is no longer a concern of the First Amendment. A truly panacean remedy requires an introspective look into the foundations of the Free Exercise Clause and a careful evaluation of the justifications for the jurisprudential departure therefrom. To that end, this note seeks to reinforce the importance and historical understanding of the Free Exercise Clause and highlight the incongruities of the modern doctrine in comparison. Thus, part I undertakes a review of the Free Exercise Clause as understood at the time of the Founding. This review, though not exhaustive, is sufficient to provide the proper lens through which to view the flaws of the modern Free Exercise Clause and the foundations upon which new doctrine must be built. Part II provides a critical analysis of the Supreme Court's free exercise jurisprudence and its relatively recent evolution into the singular form this note will refer to as the *Smith* doctrine.[8]

However, highlighting the theoretical flaws of doctrine is not enough, nor does it provide an adequate understanding of the current state of free conscience in free exercise law, and, accordingly, this note will focus on illustrating its effects prominently on display in recent state and federal litigation. Therefore, part III discusses the position of today's free exercise claimant and the stark inability of the Free Exercise Clause to provide meaningful protection. Part IV seeks to provide a workable alternative to the *Smith* doctrine that respects individual religious autonomy

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what they will and make known any objection to same sex marriage but they may not refuse to photograph a same sex marriage ceremony on this ground).

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

5. Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 964 (1995) (footnotes omitted).

6. *Id.*

7. *Id.* at 844.

8. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

while recognizing practical necessity in our heterogeneous society. Part V addresses the Religious Freedom Restoration Act, a separate but very much related part of the broader free exercise landscape, as well as the Supreme Court's recent decision in *Burwell v. Hobby Lobby*,[9] which greatly affected its interpretation. Finally, part VI strives to make a cogent argument for the recognition of corporate free exercise rights under the First Amendment.

Overall, the principal goal of this note is to inject life into what is now a stale free exercise debate and advocate for a meaningful reinterpretation of the Free Exercise Clause that respects its historical significance in the First Amendment. This task is essential for the continued protection of free conscience and religious liberty, for "[o]nce established, religious intolerance tends to be self-sustaining . . . . So every generation must nurture and pass on the commitment to religious liberty. Grappling with the difficult and controversial issues of religious liberty is part of that responsibility."[10]

I. THE HISTORICAL MEANING OF FREE EXERCISE

In light of the often bitter debate surrounding the religion clauses of the First Amendment, the relative clarity of the historical understanding of the Free Exercise Clause can be surprising. The Founders held a principled view of free exercise that is continually misunderstood in modern jurisprudence.[11] Such understanding can be cataloged in exhaustive detail, and the subject has certainly received such treatment.[12] Thus, a full historical account of the foundations of the Free Exercise Clause and the intellectual inspirations from which it came is not the purpose of this section. Instead, the evaluation of the historical understanding of the Clause and what it meant to those who authored the First Amendment is intended as the lens through which the modern state of free exercise will be viewed.

A. Free Exercise Meant Free Conscience

An inquiry into the connotations of religious liberty in the colonial period yields a starkly different comprehension of free exercise and its

9. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). In the interest of clarity, any use of the short hand *Hobby Lobby* in the text is a reference to the Supreme Court's decision in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) unless expressly indicated otherwise.

10. Laycock, *supra* note 1, at 451.

11. City of Boerne v. Flores, 521 U.S. 507, 546–47 (1997) (O'Connor, J., dissenting).

12. For a thorough and complete analysis of the historical understanding and background of the Free Exercise Clause, see *Flores*, 521 U.S. at 544–65 (O'Connor, J., dissenting); Laycock, *supra* note 1; Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*]; Underkuffler-Freund, *supra* note 5.

place in the First Amendment than the one that predominates in the law today. Were this not the case, modern jurisprudence would have yielded decisively divergent results.[13] Instead, the current interpretation characterizes free exercise as a sort of conditional benefit yielding inevitably to the generally applicable law and providing protection only for religious targeting.[14] Essentially, this has relegated the Free Exercise Clause to something akin to an equal protection analysis for religion with little independent meaning, and this view is utterly inconsistent with the historical understanding of religious liberty in early America.[15] At the time of the Founding, "when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise."[16] The latter interpretation envisions a meaningful Free Exercise Clause able to maintain its historic significance while the former deprives the Clause of its constitutional importance.

While the First Amendment eventually contained the phrase "free exercise" of religion, the fundamental liberty interest that necessitated the Free Exercise Clause was freedom of conscience.[17] The implicit understanding was this right protected individuals in their private as well as their public lives.[18] The conception of free exercise as individual free conscience is no small detail. Neither is the importance that this distinction held in the mind of the Founders.[19] "Of all of the 'fundamental rights' heralded during the Founding Era, calls for freedom of conscience were the most insistent and the most intense."[20] The individual's freedom of conscience was equally vital to both the Federalists and the Anti-Federalists during the constitutional convention.[21] James Madison wrote, "[c]onscience [is] the most sacred of all property," and "the exercise of [conscience is] a natural and unalienable right" as it did not base its legitimacy on positive law but on one's duty to God.[22] Thus, liberty of conscience was not subject to state control simply because it was seen as a natural right rather than a privilege granted by the state.[23] In this way, individual free conscience could not be abrogated by a lesser sovereign authority without adequate justification.[24] Such a view was shared by some of the founding generation's principal intellectual inspirations.[25] Therefore,

13. Underkuffler-Freund, *supra* note 5, at 845.
14. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).
15. *Id.* at 894 (O'Connor, J., concurring).
16. *Flores*, 521 U.S. at 552 (O'Connor, J., dissenting).
17. Underkuffler-Freund, *supra* note 5, at 844.
18. *Id.* at 845.
19. *Id.* at 891.
20. *Id.*
21. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1600 (1989).
22. *Id.* at 1601.
23. McConnell, *Origins*, *supra* note 12, at 1497.
24. *Id.*
25. *Id.*

"[o]ur Nation's Founders conceived of a Republic receptive to voluntary religious expression, not a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law."[26]

The drafting process of the Free Exercise Clause also provides powerful evidence that the Founders advocated for the protection of freedom of conscience.[27] This issue was of great importance among the states before ratification.[28] The first drafts of the religious clauses were not as succinct as they would ultimately become, and their development speaks volumes about their purpose. James Madison was the main architect of both the Establishment and Free Exercise Clauses,[29] and he proposed their first draft to the House in 1789.[30] It read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[31] The draft shows freedom of conscience was closely associated with the Founder's conception of free exercise. In fact, the terms "rights of conscience" and "free exercise of religion" were often used synonymously.[32] The phrase "rights of conscience" also appeared in the second draft as well as the final version approved by the House.[33] Similarly, the first draft of the religious clauses in the Senate read: "Congress shall make no law establishing one Religious Sect or Society in preference to others, nor shall the rights of conscience be infringed."[34] Professor Michael McConnell has emphasized several important aspects of Madison's early draft including the use of the term "rights of conscience" and its strictly protective language.[35] The adoption of the term "free exercise" itself is also vastly significant.[36] It demonstrates that Congress adopted the broadest possible version of the amendment by including the word "exercise" because it protects action along with belief.[37] Thus, the new language was no abandonment of the emphasis on conscience but simply an adoption of the most inclusive phrase.

B. Liberty of Conscience Included Religious Conduct

It is vital to understand not only the founding generation's conception of free exercise but also the scope to which they attributed that

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26. City of Boerne v. Flores, 521 U.S. 507, 564 (1997) (O'Connor, J., dissenting).
27. Underkuffler-Freund, *supra* note 5, at 919–20.
28. Laycock, *supra* note 1, at 411.
29. *Id.* at 410.
30. Underkuffler-Freund, *supra* note 5, at 920 n.380.
31. *Id.*
32. McConnell, *Origins*, *supra* note 12, at 1482–83.
33. Underkuffler-Freund, *supra* note 5, at 920 n.380.
34. Laycock, *supra* note 1, at 411–12.
35. McConnell, *Origins*, *supra* note 12, at 1481–82.
36. *Id.* at 1490.
37. *Id.*

right. Liberty of conscience was often described as, "free exercise of [r]eligion according to the dictates of conscience."[38] Moreover, the historical record demonstrates how free exercise was never limited to worship or belief.[39] "Religion was the expression of the beliefs dictated by conscience; restrictions on religious exercise were restraints on the freedom of conscience itself."[40]

Early provisions of colonial charters, accordingly, protected most religiously motivated decisions.[41] Such provisions uniformly worked their way into early state constitutions, and every state, save one, had adopted a clause protecting free exercise by 1789.[42] These early clauses were extremely broad. Four states protected *any* act that was a result of religious convictions.[43] States' free exercise clauses at this time were much more detailed than the federal Free Exercise Clause would become, and many, specifically, identified state interests weighty enough to constrain the right of free exercise.[44] The New Hampshire Constitution of 1784 is representative:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship.[45]

"These state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty."[46] Most states referenced worship in their free exercise clauses, but there is no record of any litigation over religious action not qualifying as worship. This lack of litigation indicates the distinction changed little regarding the scope of free exercise protection.[47] At the time, the nation's overwhelmingly Protestant religious view would have necessitated such a broad definition of free exercise because there would not have been a sharp distinction between worship and daily life.[48]

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38. Underkuffler-Freund, *supra* note 5, at 891.
39. City of Boerne v. Flores, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting).
40. Underkuffler-Freund, *supra* note 5, at 919.
41. McConnell, *Origins*, *supra* note 12, at 1427.
42. *Flores*, 521 U.S. at 552–53 (O'Connor, J., dissenting).
43. McConnell, *Origins*, *supra* note 12, at 1459.
44. *Flores*, 521 U.S. at 552–53 (O'Connor, J., dissenting).
45. *Id.* at 553 (quoting N.H. CONST. art. 1, § 5).
46. *Id.* at 553.
47. McConnell, *Origins*, *supra* note 12, at 1460–61.
48. *Id.* at 1460.

Based on the 18th Century worldview, free exercise would have necessarily included religiously motivated action. "Different degrees of protection for religious belief and religious action would have been seen as essentially meaningless, since the idea of belief without action was not seen as a viable choice."[49] The Founders viewed the right of free exercise as a protection of religious conduct the denial of which was presumptively illegitimate, and only strong societal concerns such as public health or the infringement of other private rights would have justified governmental regulation.[50] Such a view "make[s] sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes."[51] Although the Founders held a broad array of denominational beliefs, "they were virtually unanimous in the belief that the republic could not survive without religion's moral influence. Consequently, they did not envision a secular society, but rather one receptive to voluntary religious expression."[52] There is also little historical evidence that the Founders sought to maintain neutrality between religion and non-religion.[53] Alexis de Tocqueville wrote, "[f]or the Americans the ideas of Christianity and liberty are so completely mingled that it is almost impossible to get them to conceive of the one without the other."[54] While this may seem at odds with today's frenetic calls for the abolition of the religious from public life, there is undeniable evidence that the Founders saw religion as indispensable to good government and that religion, in general, was something to be encouraged and nurtured.[55]

Yet, the point emphasized here is not to pretend to make any new religious argument that has not already been convincingly made. Instead, it is to serve as a reminder, at the outset of the inquiry into modern doctrine, of the foundations upon which the Free Exercise Clause was built and to provide a lens through which to view the current state of the right. To be sure, asking whether a modern claim would be protected under the Founder's conception of the Free Exercise Clause will not solve all of our jurisprudential problems. However, if we are to attempt to remain true to the foundations of our country's "first freedom,"[56] we at least must give some thought to the answer.

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49. Underkuffler-Freund, *supra* note 5, at 964.
50. *Id.* at 964–65.
51. *Flores*, 521 U.S. at 555 (O'Connor, J., dissenting).
52. Adams & Emmerich, *supra* note 21, at 1595.
53. *Id.* at 1645.
54. McConnell, *First Freedom*, *supra* note 2, at 1257.
55. Adams & Emmerich, *supra* note 21, at 1572.
56. McConnell, *First Freedom*, *supra* note 2, at 1244.

II. THE MODERN EVOLUTION OF FREE EXERCISE JURISPRUDENCE

The Supreme Court's attitude toward free exercise has seen drastic ebbs and flows.[57] In 1878, the Supreme Court held there could be no excusal from the criminal prohibition of polygamy merely "because [the offender] believed the law which he had broken ought never to have been made."[58] Essentially the Court adhered, at that particular time, to a free exercise distinction between religious belief and religiously motivated conduct despite the historical evidence to the contrary.[59] However, the dividing line between religious belief and conduct would not last long after the mid-twentieth century.[60] The Court's "decidedly unsympathetic"[61] view of free exercise shifted dramatically in 1963.[62] Less than a decade later, in 1972,[63] the constitutional protection of free exercise reached its zenith in Supreme Court jurisprudence.[64] Unfortunately, the doctrinal importance of the Free Exercise Clause in the First Amendment was short lived, and the free exercise landscape changed again, perhaps most dramatically of all, in 1990 when the Supreme Court handed down its controversial decision in *Employment Division v. Smith*.[65] *Smith* fashioned a veritable retraction of free exercise jurisprudence, and it continues to be a rallying point for free exercise reform.

A. Pre-*Smith* Precedent

In the recent history before *Smith*, the Supreme Court was relatively protective of free exercise claims.[66] One of the foremost examples was the Court's decision in *Sherbert v. Verner* involving the claim of a member of the Seventh-day Adventist Church who was fired for refusing to work on Saturday, "the Sabbath Day of her faith."[67] Her dismissal on these grounds disqualified her from receiving unemployment

57. Jesse H. Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV. 1709, 1713–15 (2000). This Article largely focuses on the historical foundations of free exercise and the departure of the Supreme Court's free exercise doctrine from those foundations in the *Smith* decision. Necessarily, early Supreme Court free exercise precedent is not examined here. For an evaluation of such precedent from the time of the Founding, *see* Laycock, *supra* note 1

58. Reynolds v. United States, 98 U.S. 145, 167 (1878).

59. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114 (1990) [hereinafter McConnell, *Revisionism*].

60. For a careful analysis of major precedent for both the Free Exercise Clause and the Establishment Clause, see John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847 (1984).

61. Choper, *supra* note 57, at 1713.

62. Sherbert v. Verner, 374 U.S. 398 (1963).

63. Wisconsin v. Yoder, 406 U.S. 205 (1972).

64. Choper, *supra* note 57, at 1715.

65. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

66. Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851 (2001).

67. *Sherbert*, 374 U.S. at 399.

benefits under state law.[68] The South Carolina Supreme Court rejected her free exercise claim, finding that she was not prevented from exercising or observing her conscientious religious beliefs.[69] For the first time, the Supreme Court granted constitutional relief solely under the Free Exercise Clause.[70] In one of the opinion's most important points, the Court noted past cases upholding burdens on free exercise all involved conduct that "invariably posed some substantial threat to public safety, peace, or order."[71] Here, the Court demonstrated a jurisprudential view of the Free Exercise Clause that comported with a historical understanding of the Clause. Unsurprisingly, such language neatly tracks Madison's understanding of the permissible burdens of free exercise which recognized the impossibility of protecting all religiously inspired conduct and established that paramount state interests are required to justify such burdens constitutionally.[72]

With the adoption of this Free Exercise Clause interpretation, the *Sherbert* Court expressly required the finding of a compelling governmental interest to justify a burden on a claimant's free exercise rights.[73] In such a "highly sensitive" area of constitutional interpretation, the Court was careful to remark "no showing merely of a rational relationship to some colorable interest would suffice[.]"[74] Ultimately, no compelling interest was found, and the denial forced the claimant "to choose between following the precepts of her religion and forfeiting benefits[.]"[75] The state's argument that the denial was valid because unemployment benefits were a privilege, not a vested right, was dismissed out of hand: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[76] Accordingly, the Court found that the denial constrained the claimant to abandon religious conviction in violation of her free exercise rights,[77] and *Sherbert*, thus, reaffirmed the constitutional importance of the Free Exercise Clause and provided concrete protection reflective of that importance.[78]

A decade later, that protection reached its high-water mark[79] in *Wisconsin v. Yoder*.[80] *Yoder* held the Free Exercise Clause prevented the

68. *Id.* at 401.
69. *Id.*
70. Choper, *supra* note 57, at 1714.
71. *Sherbert*, 374 U.S. at 403.
72. McConnell, *Origins*, *supra* note 12, at 1464.
73. *Sherbert*, 374 U.S. at 403.
74. *Id.* at 406.
75. *Id.* at 404.
76. *Id.*
77. *Id.* at 410.
78. For a thorough evaluation of *Sherbert* and the creation of the substantial burden requirement in free exercise law, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).
79. Choper, *supra* note 57, at 1715.

state of Wisconsin from requiring Amish children to attend formal high school until the age of sixteen.[81] Until 1990, *Yoder* remained *the* landmark decision in Free Exercise Clause jurisprudence.[82] Perhaps its most significant contribution is the intensely fact-specific manner with which the Court analyzed the free exercise claim.[83] Unlike the position taken later in *Smith*, the Court focused on the unique pressure the Wisconsin law placed on Amish families and their religious autonomy.[84] The Court surveyed Amish traditions, beliefs, and the effects of compulsory secondary education on their rural way of life.[85]

> In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.[86]

The Court noted its goal of preserving religious liberty "[b]y preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses . . . ."[87] It warned that the dispensation of such claims is a delicate task and found the claim did not come from a "recently discovered" or "progressive" group but one supported by centuries of history.[88] By employing such a factual methodology, the Court avoided the rigid application of overbroad standards and remained willing to take into consideration the specific burdens placed upon individual free exercise.

Yoder's attention to detail is perhaps its best attribute; however, set against modern free exercise law, its rationale concerning the applicability of the law also remains salient. Here, the Court expressly rejected the notion that "regulations of general applicability" placed the affected conduct beyond the protection of the Free Exercise Clause.[89] One of the most important, and often overlooked, portions of the opinion states:

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80. 406 U.S. 205 (1972).
81. *Id.* at 234.
82. Duncan, *supra* note 66, at 853.
83. *Yoder*, 406 U.S. at 216–19.
84. *Id.*
85. *Id.*
86. *Id.* at 219.
87. *Id.* at 221.
88. *Yoder*, 406 U.S. at 235.
89. *Id.* at 220.

> Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation *neutral on its face* may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[90]

Importantly, the Court neither rejected Wisconsin's interests in requiring education nor questioned its power to enact compulsory education laws,[91] and the law itself was not invalidated.[92] It was the law's specific application to the Amish community which posed the constitutional problem.[93] Wisconsin was left on its own to work out "reasonable standards" to protect the continued education of Amish children while respecting their right of free exercise.[94]

B. The Current Free Exercise Standards

When the Court turned sharply away from the rationales of *Sherbert* and *Yoder* with the *Smith* decision in 1990, our First Freedom became our "most embattled."[95] *Smith* envisioned a move away from the case specific analysis of *Yoder* toward a streamlined Free Exercise Clause jurisprudence. Instead of the *Sherbert* compelling interest test, the *Smith* Court strove for the doctrinal clarity of broad standards. The *Smith* doctrine certainly has this quality in spades; however, it lacks the attention to detail and the seriousness of the previous free exercise inquiry, and this loss vastly outweighs the benefit gained through its black letter clarity. Nevertheless, the *Smith* decision is the foundation of the entire body of current free exercise law.

1. The *Smith* doctrine

Justice O'Connor concurred in the judgment in *Smith*, but she strongly disagreed with the new free exercise standard laid down by the majority.[96] She remarked, "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral

90. *Id.* (emphasis added).
91. *Id.* at 221.
92. *Id.* at 236.
93. *Yoder*, 406 U.S. at 228–29.
94. *Id.* at 236.
95. McConnell, *First Freedom*, *supra* note 2, at 1265.
96. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring).

toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[97] Alongside the Court's pre-*Smith* precedent and the historical understanding of free exercise, Justice O'Connor's statement is steadfastly consistent.[98] Nonetheless, *Smith's* basic tenant is that it is a "permissible" reading of the Free Exercise Clause "to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[99]

The unemployment compensation claim brought in *Smith* famously involved the drug peyote, a plant-derived hallucinogen, used in traditional ceremonies of the Native American Church in Oregon.[100] When the plaintiffs filed their claims, they were denied unemployment compensation due to their ingestion of the Oregon schedule I drug, peyote. This drug use constituted misconduct which nullified their unemployment eligibility.[101] The Court's summary of the legal relationship between the law and the relevant conduct represents the simplistic way in which the *Smith* doctrine can be applied to generally applicable laws: "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."[102] *Yoder's* goal of preserving religious autonomy through doctrinal flexibility was abandoned.[103] In fact, it was cited only once in a string cite and in a completely new context.[104]

Smith does not deny the Free Exercise Clause protects actions as well as beliefs,[105] but it does withhold free exercise protection unless the offending law is "specifically directed" at particular conduct in a non-neutral fashion.[106] Therefore, strictly speaking, no law infringes upon one's right of free exercise unless that law was passed specifically to target specific groups or conduct.[107] This rather circular rationale is fatal to every free exercise claim brought under a generally applicable law.[108]

97. *Id.* at 901.
98. *Yoder*, 406 U.S. at 221.
99. *Smith*, 494 U.S at 878.
100. *Id.* at 874.
101. *Id.*
102. *Id.* at 890.
103. *Yoder*, 406 U.S. at 221.
104. *Smith*, 494 U.S. at 881.
105. *Id.* at 877.
106. *Id.* at 878.
107. *Id.*
108. *See id.* at 890.

a. The Flaws of Smith's Free Exercise Interpretation

The *Smith* decision has been widely criticized for its monumental shift in free exercise theory.[109] Regardless of whether *Smith* is seen favorably or unfavorably,[110] it is not difficult to pin down the underlying concern which prompted the decision. "[F]ear of religious pluralism is the root of Justice Scalia's much-maligned majority opinion in *Smith*."[111] The language of the opinion indicates practical concerns about maintaining a fact-specific free exercise standard.[112]

> In *Smith*, the voice whispering in Justice Scalia's ear warned him that a strongly protective free exercise doctrine would place at risk not only drug laws but also laws dealing with compulsory military service, payment of taxes, manslaughter, child neglect, compulsory vaccination, traffic regulation, minimum wages, child labor, animal cruelty, environmental protection, and racial equality. In short, the social contract itself might not survive a constitutional rule protecting religiously motivated conduct from governmental restrictions.[113]

This was the exact concern of the Court in *Reynolds*, cited by *Smith,* which stated the notion of permitting stringent free exercise protection would "permit every citizen to become a law unto himself."[114]

There are two flaws with this assumption. First, *Sherbert* and *Yoder* dealt successfully with the same concern nearly a century after *Reynolds*.[115] Furthermore, there is no evidence a flood of free exercise claims bombarded the Supreme Court after the *Sherbert* decision in 1963. Second, these concerns are unnecessary from the historical perspective of free exercise. The above examples of rampant law-breaking would not be permissible because these types of regulations are justified by the compelling state interests of protecting private rights and public safety.[116] In fact, it is reasonable to assume *Smith's* new interpretation was

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109. René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 730 (2011).

110. For a more complementary analysis of the *Smith* decision based on a conception of the Free Exercise Clause largely as a protection of religious equality, see Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1195 (2008).

111. Duncan, *supra* note 66, at 853 (footnote omitted).

112. *Smith*, 494 U.S. at 879.

113. Duncan, *supra* note 66, at 854.

114. *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

115. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

116. Underkuffler-Freund, *supra* note 5, at 965.

unnecessary to uphold the Oregon drug law since the Court could have simply found the regulation justified by these same governmental interests. Justice O'Connor expressly recognized this in her concurrence.[117] Even supporters of *Smith's* general interpretation of the Free Exercise Clause have acknowledged this point: "The *Smith* opinion itself, however, cannot be readily defended. The decision, as written, is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction. The opinion is also a paradigmatic example of judicial overreaching."[118]

Justice O'Connor found the majority's "parade of horribles" unconvincing.[119] She pointed out such concerns have always been present, yet, the compelling interest standard has proven itself workable.[120] Professor McConnell addresses *Smith's* practical concerns from a different angle.[121]

> Consider the fact that employment discrimination laws could force the Roman Catholic Church to hire female priests, if there are no free exercise exemptions from generally applicable laws . . . . Or that churches with a religious objection to unrepentant homosexuality will be required to retain an openly gay individual as church organist, parochial school teacher, or even a pastor. Or that public school students will be forced to attend sex education classes contrary to their faith. Or that religious sermons on issues of political significance could lead to revocation of tax exemptions. Or that Catholic doctors in public hospitals could be fired if they refuse to perform abortions. Or that Orthodox Jews could be required to cease and desist from sexual segregation of their places of worship. If the Court wishes to consider a parade of horribles, it should parade the horribles on both sides. But while the two parades may be of the same length, they are of very different quality. The judicial system is able to reject claims that would be horrible if granted; believers are helpless to deal with infringements on religious freedom that the courts refuse to remedy.[122]

117. *Smith*, 494 U.S. at 903 (O'Connor, J., concurring).

118. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–09 (1991) (footnote omitted).

119. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

120. *Id.*

121. McConnell, *Revisionism*, *supra* note 59, at 1141–42.

122. *Id.* at 1142–43 (footnote omitted).

This string of examples exposes a fundamental problem with the *Smith* doctrine. *Smith* sacrifices free exercise claims of good merit due to concerns about the efficient application of constitutional law, and it places the strictures of generally applicable laws upon a pedestal beyond the reach of the Free Exercise Clause. Consequently, there has not been a single grant of relief under *Smith's* interpretation of the Free Exercise Clause since 1993.[123]

Oddly, *Smith* also attempts to rely on the political process for the protection of free exercise rights, noting pointedly that several states have implemented laws exempting sacramental peyote use from their respective criminal drug laws.[124] This reassurance misses the mark since it is irrelevant to Free Exercise Clause interpretation how many states chose to protect peyote use legislatively. "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[125] The Free Exercise Clause exists in the First Amendment *specifically* for this reason. The Court recognized that relegating free exercise protection to legislatures "will place at a relative disadvantage those religious practices that are not widely engaged in," yet, it maintains this is an "unavoidable consequence."[126] Justice Blackmun's thoughts on this idea are prescient: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty-and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."[127] As Justice Blackmun eloquently stated, such resignation, concerning the loss of free exercise protection, cannot be squared with the historical reverence for the Free Exercise Clause nor the rest of our First Amendment jurisprudence.[128]

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123. Reyes, *supra* note 109, at 725.

124. *Smith*, 494 U.S. at 890.

125. *Id.* at 902 (O'Connor, J., concurring).

126. *Id.* at 890 (majority opinion).

127. *Id.* at 909 (Blackmun, J., dissenting).

128. The reverence with which the Free Speech Clause of the First Amendment has been treated in our constitutional history should reveal a stark contrast when compared with the *Smith* doctrine's result-oriented treatment of the Free Exercise Clause. Justice Brandeis' famous précis of the Founder's motivations for including the right of free speech in the First Amendment is as excellent an example as any in our history.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest

b. "Hybrid" Free Exercise Theory

The *Smith* Court outright stated "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[129] Given the facts of *Yoder*, this is a bit perplexing. Accordingly, the Court's explanation of this statement has been criticized as "strange and unconvincing."[130] The Court explains its disregard of *Yoder* and *Sherbert* in a very unique way by classifying those decisions as an entirely separate category of First Amendment cases involving "the Free Exercise Clause in conjunction with other constitutional protections."[131] Under this explanation, the exemption from mandatory high school attendance in *Yoder* was justified only by the confluence of free exercise rights and the parental substantive due process right to control the education of children.[132] Thus, the combination of free exercise rights, or any constitutional right, with another fundamental right creates a "hybrid" claim deserving greater protection because of the combined liberty interests.[133] Since *Smith* presented no such combination, the free exercise claim did not receive consideration because no exception may be made to the generally applicable law.[134] Under this explanation of past precedent, the Court created a new framework with which to analyze claims of religious liberty.[135]

Justice Souter openly criticized the hybrid rights theory and *Smith*'s attempt to distinguish prior free exercise precedent in a later free exercise case.[136] He stated, "[t]hough *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded."[137] He believed *Yoder* left no doubt about

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> menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). He continued, "[b]elieving in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.* at 375–76. *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943). Such eloquent sentiment should inspire pride and respect for the entire First Amendment, including the Free Exercise Clause.

129. *Smith*, 494 U.S. at 878–79.

130. McConnell, *Revisionism*, *supra* note 59, at 1115.

131. *Smith*, 494 U.S. at 881.

132. *Id.* at 881 n.1.

133. *Id.* at 882.

134. *Id.*

135. *Id.*

136. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566 (1993) (Souter, J., concurring).

137. *Id.*

its focus on the free exercise of religion.[138] Such sentiment has been widely shared in legal scholarship:[139] "*Yoder* is like a moth that experienced pupation for nearly two decades in a free exercise cocoon only to emerge in *Smith* as a hybrid case involving both free exercise and parental rights."[140] Professor McConnell voiced a suspicion alleging, "the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."[141] Regardless, it is not an explanation that has enjoyed much support by the federal judiciary.[142]

2. *Lukumi*

Smith has a companion in *Church of the Lukumi Babalu v. City of Hialeah*.[143] However, *Smith* dominates the structure to the point that *Lukumi* supports no substantial weight of its own.[144] Thus, *Lukumi* is part of the existing framework, although it functions only secondarily.[145] The initial suit was brought to challenge a city ordinance passed in Hialeah, Florida, which was, as discussed in depth by the Court,[146] almost certainly written for the specific purpose to prevent the religious sacrifice of animals by a local Santeria church.[147] This fact alone is the most important aspect of the case, and it is why *Lukumi* is relegated to a secondary role in modern free exercise jurisprudence.[148] "The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."[149] This conclusion changed the fundamental rubric used to evaluate the constitutionality of the law.[150] Thus, no compelling interest is required to uphold a *neutral* law; instead, evidence of specific targeting of religious practice was sufficient to mandate a more faithful application of strict scrutiny so that "many laws will not meet the test."[151] "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only

138. *Id.*
139. Reyes, *supra* note 109, at 730.
140. Duncan, *supra* note 66, at 857.
141. McConnell, *Revisionism*, *supra* note 59, at 1121.
142. Elane Photography, LLC v. Willock, 284 P.3d 428, 442–43 (N.M. Ct. App. 2013) (discussing the treatment and criticism of the hybrid rights theory by federal courts).
143. *Lukumi*, 508 U.S. at 520.
144. *See id.* at 546.
145. *Id.*
146. *Id.* at 534–40.
147. *Id.* at 526–28.
148. *Lukumi*, 508 U.S. at 546.
149. *Id.* at 534.
150. *Id.* at 531–32.
151. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny."[152]

Lukumi establishes a small measure of meaningful free exercise protection still exists in a very specific capacity, but this corner is tight indeed.[153] Only clear religious animus allows a claim to bypass the *Smith* doctrine. Essentially, this requires ineptly drafted legislation or particularly damaging legislative history.[154] The claim in *Lukumi* involved both.[155] Blatant evidence like this demonstrates how *Lukumi* was not a close case.[156] The ordinance affected only the Santeria church, and the legislative history demonstrated it was written specifically for that purpose.[157] For this reason, the decision serves only as a warning against religiously antagonistic laws, but it is not a viable conduit for free exercise claims.[158]

3. *Smith* and *Lukumi* as Unitary Doctrine

It has been argued "that free exercise is alive and well in the wake of *Smith* and (particularly) *Lukumi*."[159] As the theory stands, *Smith* is merely the gatekeeper to the more stringent standards of *Lukumi*, and the more meaningful protection available in cases of religious targeting is a workable compromise between fears of religious pluralism and the protection of religious liberty.[160] That *Smith* serves a gatekeeping function is an apt comparison theoretically,[161] but this has not played out in practice.[162] If there was reason to be optimistic the *Smith*-*Lukumi* duo would adequately protect free exercise in 1993, it is no longer warranted. Indeed, the *Smith* decision has proven itself such a proficient gatekeeper that no claim has gained access to *Lukumi's* heightened standard at the Supreme Court level since it was decided.[163]

By way of comparison, the respective conduct at issue in *Smith* and *Lukumi* deserves attention as well. The protected practice in *Lukumi* is not the prototypical free exercise conduct one might expect to find shelter in a post-*Smith* universe. The Santeria church, long persecuted in Cuba, conducted animal sacrifices at ceremonies for events like marriages, births,

152. *Lukumi*, 508 U.S. at 546.
153. *Id.*
154. *Id.*
155. *Id.* at 534–42.
156. Incredibly, the president of the Hialeah city council was on record saying, "[w]hat can we do to prevent the Church from opening?" *Id.* at 541. This sort of explicit legislative history is not often present, making *Lukumi* largely inaccessible.
157. *Lukumi*, 508 U.S. at 542.
158. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).
159. Duncan, *supra* note 66, at 851.
160. *Id.* at 881.
161. *Id.*
162. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).
163. Reyes, *supra* note 109, at 725.

and acceptance of new members.[164] *Smith*, on the other hand, concerned the ingestion of peyote during sacramental worship by Native Americans.[165] It is worth noting the irony involved in the protection of the conduct in *Lukumi* and the denial of protection for traditional Native American practices in *Smith*. This demonstrates the incongruous application of the *Smith* doctrine. At its core, *Smith* protects *laws*, not conduct. One of the most damaging aspects of the *Smith* decision is that the conduct at issue is not relevant to the outcome.[166] Only the law is given scrutiny, not the religious exercise, and this fosters a lack of respect for the right.

After *Lukumi*, Justice Scalia lamented that it turned the *Smith* inquiry into one concerned only with the intent of the drafters of the law at issue.[167] He maintains this was not his position when writing the *Smith* opinion which, instead, was to focus on the law's effects.[168] The point is well taken, but an analysis of the intent of the drafters is now necessary under *Lukumi*.[169] This is another inherent flaw in the *Smith* doctrine. Essentially, the analysis has evolved from a debate about the protection of conduct versus belief,[170] to a careful inspection of the individual burden on free exercise,[171] into an inquiry that disregards the religious conduct entirely. The latter evolution has put tremendous distance between free exercise and liberty of conscience.

III. THE INSIGNIFICANCE OF THE MODERN FREE EXERCISE CLAUSE

The current free exercise jurisprudence, completely severed from the historical emphasis on free conscience, has resulted in a curious consequence in modern free exercise law. "*Smith* appears to leave the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless."[172] The *Smith* doctrine has essentially relegated the Free Exercise Clause to a position of such low

164. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993).

165. *Smith*, 494 U.S. at 874.

166. If there is any doubt that the general applicability standard has caused a certain blindness in Free Exercise Clause interpretation by placing only the applicability of the law under analysis and not the rights of conscience, one need only look to the failed attempts to bring free exercise claims in state courts. *See generally* Elane Photography, LLC v. Willock, 309 P.3d 53, 73–75 (N.M. 2013) (deciding the free exercise claim of Elane Photography after an evaluation of the application of the New Mexico Human Rights Act and concluding that the law was neutral and of general applicability, and, thus, there could be no Free Exercise Clause violation unless a hybrid claim was made), *cert. denied*, 134 S. Ct. 1787 (2014).

167. *Lukumi*, 508 U.S. at 558–59 (Scalia, J., concurring).

168. *Id.* at 558.

169. *Id.* at 534–35 (majority opinion).

170. Reynolds v. United States, 98 U.S. 145, 167 (1878).

171. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

172. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 233 (1991).

importance that any claim relying solely thereon is almost certain to fail. This interpretation would surely seem strange to a founding generation that attributed such importance to the careful protection of religious freedom.

A. The Position of the Current Free Exercise Claimant

In effect, the *Smith* doctrine is a grant of legislative immunity to the generally applicable law, and it has relegated the Free Exercise Clause to a truly dependent state. It is no exaggeration the First Amendment portion of a given free exercise argument is likely the least significant aspect of any claim. The Free Exercise Clause and the rights it once protected are quite literally relegated to a footnote in Supreme Court jurisprudence.[173] "[T]he fact that the Free Exercise Clause has become so doctrinally otiose is itself an argument for reinvesting the Clause with independent meaning."[174] If this was not apparent after *Smith*, modern case law has surely made it so, and there is no better example than the recent litigation out of New Mexico in *Elane Photography v. Willock*.[175] *Elane Photography* involves an intermingling of state law with First Amendment principles, including free speech and free exercise.[176] Overall, the case is a comprehensive demonstration of the present impotence of the Free Exercise Clause and the insignificance of free exercise claims. The irony in *Elane Photography* and similar cases is the lack of real consideration of free exercise of religion despite the glaring implications for individual free conscience.

Elane Photography, owned in part by Elaine Huguenin,[177] is engaged in commercial photography in New Mexico.[178] When it declined to photograph a same-sex wedding ceremony, it found itself in the midst of a lengthy discrimination suit under the New Mexico Human Rights Act ("NMHRA").[179] Elane Photography's claim the NMHRA unconstitutionally burdened free exercise proved unsuccessful as the judgment against it was upheld by the New Mexico Court of Appeals,[180] and, in 2013, the New Mexico Supreme Court.[181] Before the case reached its final resolution, some commentators believed it should be resolved on the grounds of a compelled speech argument alone.[182] However, the free

173. *See generally* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 697 n.27 (2010) (dispensing of claimant's free exercise argument in a lone footnote).

174. Reyes, *supra* note 109, at 725.

175. Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013).

176. *Id.* at 59.

177. Elaine Huguenin, who owns the company with her husband, spells her first name differently than the first name of the company, Elane Photography.

178. *Elane Photography*, 284 P.3d at 432.

179. *Id.* at 432–33.

180. *Id.* at 438.

181. Elane Photography, LLC v. Willock, 309 P.3d 53, 75 (N.M. 2013).

182. Brief for The Cato Institute *et al.* as Amici Curiae Supporting Appellant at 3–5, Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013) (arguing that *Elane*

exercise facet of the case is unmistakable, and the pursuit of alternative arguments shows the lack of confidence in such an argument.[183]

While Elane Photography initially advanced a myriad of claims in support of its assertion the state statute interfered with its free exercise of religion, the treatment of its First Amendment argument is a forceful example of the insignificance of the Free Exercise Clause in modern litigation.[184] Before the New Mexico Supreme Court, the analysis of the free exercise claim was dwarfed by that of the compelled speech issue.[185] Most importantly, the Free Exercise Clause analysis centered, as it must under *Smith*, on the statute itself, not the free exercise burden.[186] Left with no alternative, given *Smith*'s unyielding application, Elane Photography was forced to devote much of its efforts to the applicability of the statute. It focused on the law's exemptions in an effort to show it was not generally applicable and, thus, not subject to *Smith's* standards.[187] The court rejected the argument that specific exemptions, such as home sales, prevented the statute from being found generally applicable.[188]

> The exemptions in the NMHRA are ordinary exemptions for religious organizations and for certain limited employment and real-estate transactions. The exemptions do not prefer secular conduct over religious conduct or evince any hostility toward religion. We hold that the NMHRA is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.[189]

The hybrid right argument was also quickly dismissed on the grounds it was not adequately briefed,[190] likely because the lower court pointedly cited

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Photography should be decided in favor of the claimant based on the theory that forcing the company to take photos of same-sex weddings is controlled speech and so violates Elane Photography's right to choose what type of speech to create within the meaning of Wooley v. Maynard, 430 U.S. 705 (1977)).

183. Aside from the necessary interplay between these two fundamental protections of the First Amendment, the compelled speech aspects of the case are not addressed here. For a summary of the free speech aspects of *Elane Photography,* see generally Susan Nabet, Note, *For Sale*, 77 BROOK. L. REV. 1515 (2012) (discussing *Elane Photography* in detail with respect to the free speech arguments and implications).

184. Apart from its free speech arguments, Elane Photography asserted a violation of the New Mexico Constitution, the Free Exercise Clause, the Religious Freedom Restoration Act, and the New Mexico Religious Freedom Restoration Act. *Elane Photography*, 284 P.3d at 433.

185. The court devoted slightly more than four pages to the entire First Amendment argument, including the hybrid rights portion. *Elane Photography*, 309 P.3d at 73–76.

186. *Id.* at 73–75.

187. *Id.* at 74.

188. *Id.*

189. *Id.* at 75.

190. *Elane Photography*, 309 P.3d at 75–76.

widespread criticism of the theory.[191] In the end, the New Mexico Court of Appeals summed up the position of Elane Photography, and all free exercise claimants in similar positions, quite succinctly: They "must accept the reasonable regulations and restrictions imposed upon the conduct of their commercial enterprise despite their personal religious beliefs . . . ."[192] The owners are free to express their religious beliefs and tell [plaintiff] or anyone else what they think about same-sex relationships and same-sex ceremonies," but they simply may not refuse to photograph them.[193] Regrettably, such sentiment no longer seems controversial in today's free exercise law.

The sort of analysis employed by the New Mexico state courts is worryingly simplistic, but, generally speaking, this is not the fault of state courts charged with the application of the federal interpretation of the Free Exercise Clause. The focus on the law and not the merit of the free exercise claim is a natural consequence of the *Smith* doctrine. General applicability now equals inviolability, and there is no room for individualized analysis. Thus, today's free exercise jurisprudence under *Smith* refuses to wrestle with difficult questions of religious liberty because of the specter of religious pluralism.[194]

B. Reliance on State Law

The unmistakable consequence of *Smith*'s "virtual abandonment"[195] of the Free Exercise Clause forces claimants to rely on state law to vindicate free exercise rights. This is an inherently odd position for a First Amendment right to find itself, especially one so revered at the Founding.[196] It is also a position that necessarily yields drastically different results, and, at least in this context, that is not a positive attribute. The position of the modern free exercise claimant is wholly dependent upon the nature of state protection of religious liberty.[197] If that protection is inadequate, and it often is, the sterility of the Free Exercise Clause becomes ever more glaring.

State judiciaries have spent a considerable amount of time balancing the Supreme Court's rationale in *Smith* with countervailing interests in state constitutions, and this is ongoing today just as in the wake

191. Elane Photography, LLC v. Willock, 284 P.3d 428, 442–43 (N.M. Ct. App. 2013).
192. *Id.* at 443.
193. *Id.* at 444.
194. Duncan, *supra* note 66, at 853.
195. Smith, *supra* note 172, at 231.
196. McConnell, *First Freedom*, *supra* note 2, at 1244.
197. This is assuming that the claimant is unable to assert a claim under the Religious Freedom Restoration Act. This statute, and its limited application, is discussed in detail in section five.

of the decision.[198] At least eleven states have held that their respective state constitutions mandate free exercise protection consistent with pre-*Smith* jurisprudence.[199] Relying on these provisions often yields positive results for claimants and the most effective alternative to First Amendment claims.[200] However, this is not the case in a majority of states. Furthermore, state constitutional claims face several structural obstacles.[201] The relevant body of law is often undeveloped in state courts because of the unfortunate (and overused) practice of interpreting state and federal constitutional provisions identically.[202] Thus, there is often no meaningful

198. This issue has continually remained relevant in state litigation. *See generally* State v. Miller, 549 N.W.2d 235, 241 (Wis. 1996) (holding that the Wisconsin Constitution mandated the continued use of strict scrutiny for free exercise claims despite the holding in *Smith*); Elane Photography, LLC v. Willock, 284 P.3d 428, 441 (N.M. Ct. App. 2013) (holding that federal standards should be used to interpret the state constitution's religion clauses because federal standards have been cited for state constitutional interpretation in the past).

199. W. Cole Durham & Robert Smith, Annotation, *State Constitutional Protections*, 2 RELIGIOUS ORGANIZATIONS AND THE LAW § 10:51 (2013).

200. *See generally* Stinemetz v. Kan. Health Policy Auth., 252 P.3d 141, 161 (Kan. Ct. App. 2011) (stating that the Kansas Constitution provides greater protection to religious free exercise than the First Amendment); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (recognizing that the more specific language of the Minnesota Constitution's protection of free conscience is more specific and is more protective of religious liberty than the First Amendment); Humphrey v. Lane, 728 N.E.2d 1039, 1045 (Ohio 2000) (stating that there is no reason to interpret the religion clauses of the Ohio Constitution identically with the First Amendment and holding that the Ohio Constitution's free exercise protection is broader and requires the continued use of the compelling interest test); *Miller*, 549 N.W.2d at 239 (concluding that the Wisconsin Constitution is not "constrained" by the federal interpretation of the Free Exercise Clause and that it provides an independent basis for free exercise claims).

The only other alternative for claimants seeking state protection of free exercise is to rely on reactionary state statutes aimed at the protection of religious rights. Fifteen states have enacted a state version of the federal Religious Freedom Restoration Act in an attempt to provide such protection. W. Cole Durham & Robert Smith, Annotation, *State Religious Freedom Restoration Acts (State RFRAs)*, 2 RELIGIOUS ORGANIZATIONS AND THE LAW § 10:53 (2013). While the issue is still largely undecided, some state courts have held that these statutes do not apply to suits between private parties. *Id.* Thus, such statutes do not solve all free exercise problems even in the states that have enacted them. This was the holding of the New Mexico Supreme Court in *Elane Photography*. Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013).

201. For a detailed discussion of the interplay between state and federal constitutional interpretation and the doctrines of lockstep and divergence, see ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009).

202. *See generally* S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Christ Elementary Sch., 696 A.2d 709, 715 (N.J. 1997) (limiting its free exercise analysis to the federal standards because the court deemed that the current federal jurisprudence made state constitutional interpretation unnecessary); *Elane Photography*, 284 P.3d at 441 (dismissing an argument for broader free exercise protection under the state constitution and continuing to use federal standards); HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, 642 (Tex. 2007) (assuming without deciding that the Texas Constitution's protection of free exercise is coextensive with the Free Exercise Clause).

state precedent on which to rely.[203] In turn, this leads to a continuation of this same trend as state courts remain in lockstep with the federal standard even when it takes a drastic turn as it did in *Smith*. It is the job of the state's highest court to interpret the Constitution, and if that court has not done so with respect to free exercise, it is not the fault of the claimant. Nor is it a convincing argument for failing to address the issue when it *is* before the court.

More fundamentally, state courts are often loath to interpret similar state provisions differently from the federal counterpart.[204] At times, state supreme courts do not wade deeply enough into the state constitutional interpretation, and some are seemingly uninterested in the question at all. In one particularly troubling example, the New Jersey Supreme Court found no reason to consider whether the New Jersey Constitution provides greater protection to free exercise after citing the state equivalent of the *Establishment Clause*.[205] The preceding paragraph of Article I of the New Jersey Constitution begins, "[n]o person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience,"[206] yet the court neither cited this provision nor discussed its relevance to the argument for greater state protection of free exercise.[207] Similarly, Elane Photography turned to the New Mexico Constitution in hopes the court would find a greater degree of protection for free exercise than the federal Constitution.[208] The court showed no inclination to open this line of inquiry and maintained the continued use of "federal standards to analyze Elane Photography's free exercise of religion claim."[209] It indicated the New Mexico Constitution prohibited only the forced support of certain denominations.[210] Much like the previous example, the quoted portion of the New Mexico Constitution left out a portion of Article II, Section 11 which states "[e]very man shall be free to worship God according to the dictates of his own conscience."[211] Whether this should be sufficient to confer greater protection under the

203. *Elane Photography*, 284 P.3d at 441 (pointing out that the claimant cannot offer any state precedent to support its argument for greater free exercise protection under the state constitution).

204. *S. Jersey Catholic Sch.*, 696 A.2d at 715 ("[T]here is no need to consider whether our State Constitution affords greater religious protection than that afforded by the First Amendment.").

205. *Id.*

206. N.J. CONST. art. 1, ¶ 3.

207. *S. Jersey Catholic Sch.*, 696 A.2d at 715.

208. *Elane Photography*, 284 P3d. at 440.

209. *Id.* at 441.

210. *Id.* at 441 (citing N.M. CONST. art. II, § 11). Judge Wechsler strongly disagreed with the court's discussion of the New Mexico Constitution on this issue. *See id.*, 284 P.3d at 445 (Wechsler, J., concurring).

211. N.M. CONST. art. II, § 11.

New Mexico Constitution, as the concurring opinion suggests,[212] is certainly debatable, but it surely is relevant to the discussion.

Ultimately, this sort of shiftless state constitutional interpretation has serious consequences both for claimants and the development of coherent state constitutional law. Litigants often fail to assert these claims because of the begrudging reception and inattention these claims sometimes receive.[213] When asserted, they too often are only an afterthought. To be sure, many state courts have dutifully considered these claims, and several have found stringent protection in the state constitution's religion clauses.[214] Nevertheless, apathetic state constitutional interpretation will always exist leaving the protection of free exercise scattered. Such division is reason enough to conclude that state constitutional protection cannot fill *Smith*'s void.

IV. RESTORING INDEPENDENT SIGNIFICANCE TO THE FREE EXERCISE CLAUSE

Recent cases like *Elane Photography* denote a rather bleak view of the importance of individual liberty of conscience and treat religious liberty more as a practical impossibility than a historically venerable right. Given the track record of free exercise claimants since *Smith* was decided in 1990, it is not unreasonable to conclude the Free Exercise Clause has permanently shed its historical significance in our modern jurisprudence.[215] The degradation of the Free Exercise Clause has been met with resignation and treated as an unavoidable consequence in the orderly progression of society as the fear of religious pluralism has infected nearly every aspect of free exercise law.[216] This trend must be reversed if there is to be a reinvigoration of protection for free exercise and free conscience.

A. Returning to Pre-*Smith* Doctrine and the Historical Understanding of Free Exercise

Religion is not intrinsically shielded from the burdens of neutral or generally applicable law, no matter the definition bestowed on those terms.[217] The intolerable burdens of the *Smith* doctrine have proven even

212. *Elane Photography*, 284 P.3d at 445, (Wechsler, J., concurring).

213. HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd., 235 S.W.3d 627, 642 (Tex. 2007) (pointing out that the parties did not make a state constitutional argument on their free exercise claim and that the court would assume the state and federal standards are coextensive).

214. *See* cases cited *supra* note 200.

215. Reyes, *supra* note 109, at 725.

216. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 909 (1990) (Blackmun, J., dissenting).

217. *Id.* at 901 (O'Connor, J., concurring).

more threatening than the practical concerns it was invented to remedy.[218] Fortunately, the restoration of the Free Exercise Clause does not require revolutionary constitutional interpretation. It requires only a return to the pre-*Smith* jurisprudence, the historical underpinnings of the Free Exercise Clause, and its purpose in the First Amendment. Fundamentally, this doctrine is simple. Madison characterized free exercise as an inherent right presumptively protected so long as there is no interference with public peace and security or private rights.[219] This is a simple yet powerful free exercise theory, workable in practice, and key to returning doctrinal significance to the Free Exercise Clause.

Madison's understanding, what may be called a historical approach to free exercise,[220] is more than mere theory, however. It has already held an important place in the Supreme Court's free exercise precedent. In *Sherbert*, the Court noted that while free exercise cannot be immune from all legislative restriction, "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."[221] Recognizing the need to balance necessity with the burden a regulatory system places on religious exercise, the Court managed a workable standard during this period that respected religious autonomy as much as possible, yielding to regulatory schemes only when a paramount societal concern was threatened, in other words, when there was a compelling governmental interest.[222] This standard is essentially Madison's theory gilded in modern terminology, and there is no reason to think it cannot provide a workable Free Exercise Clause framework today, just as it did in the pre-*Smith* era.

1. Shifting the Burden to the Government

One of the most important aspects of the *Sherbert* compelling interest test is that the government must justify the burden on the present claimant.[223] This focus alone will cause a dramatic departure from the current inquiry. The *Smith* doctrine's application guarantees two consequences in the presentment of every Free Exercise Clause claim. First, it requires the claimant to show non-neutrality before the court will even *consider* the burden on free exercise. The vast majority of a claimant's argument must be devoted to this issue, and it is usually outcome determinative barring the application of *Lukumi*.[224] Claimants seize on this argument because it is the only realistic way to avoid the application of

218. This is because the framework put in place by *Smith* has essentially blocked all free exercise claims not involving religious animus, thus restricting non-meritorious and meritorious claims alike.

219. McConnell, *Origins*, *supra* note 12, at 1464.

220. Underkuffler-Freund, *supra* note 5, at 965.

221. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

222. *Id.*

223. *Id.*

224. Elane Photography, LLC v. Willock, 309 P.3d 53, 73–75 (N.M. 2013).

Smith, but, practically, it ensures the government never has to justify its regulation relative to its burden on religious exercise. The second consequence is partly a product of the first. Because claimants must first argue non-neutrality, the entire judicial inquiry is dominated by the law's applicability, and courts do not have occasion to consider the individualized burden on free exercise.[225]

Both of these collateral consequences will be reversed with a re-adoption of the *Sherbert* compelling interest test. It will ensure that, once a claimant has demonstrated an encumbrance on free exercise, the ultimate burden will rest with the government to exhibit a compelling state interest justifying its constitutionality.[226] This is certainly nothing new in the protection of important individual rights, but it drastically alters how the modern free exercise claim will be adjudicated. The claimant will still bear the responsibility of proving an actual burden on religious exercise, but this will restore a vital element to this litigation because the religious burden will be evaluated upfront by courts, ensuring that individualized attention will be given to all claims.[227] The main inquiry will shift toward the merit of the claim and away from the law's applicability. This will place the right of free exercise back into its proper perspective. There will first be an "assumption of freedom of conscience" that will be negated only where a compelling governmental interest is found.[228] These procedural developments are vital to the resurrection of the Free Exercise Clause.

2. The Least Restrictive Means Requirement

The compelling interest portion of the *Sherbert* test is relatively straightforward although the Court has enunciated it somewhat differently over time.[229] However, there is one aspect of the *Sherbert* era jurisprudence that is not so settled. If the Court overrules *Smith* and reinstates the *Sherbert* test, it would have to decide another question: Whether the pre-*Smith* jurisprudence (and thus the new standard) includes a least restrictive means requirement.[230] While there is currently a divide among the Court on this

225. *Id.*

226. *Sherbert*, 374 U.S. at 403.

227. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–19 (1972).

228. Underkuffler-Freund, *supra* note 5, at 967.

229. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."); United States v. Lee, 455 U.S. 252, 257 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Sherbert*, 374 U.S. at 403.

230. For an excellent examination of this question and the scholarly debate surrounding it, see Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415 (1999).

issue and evidence to support both arguments,[231] there can be no doubt that its inclusion would greatly benefit the protection of religious liberty.

In Justice Blackmun's dissent in *Smith,* he remarked:

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest *that cannot be served by less restrictive means*. Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.[232]

Whether the least restrictive means requirement is indeed a settled portion of the standard depends on an appraisal of some imprecise language. A cursory reading of the Court's pre-*Smith* precedent indicates the compelling interest requirement is the entirety of the inquiry. Neither *Sherbert* nor *Yoder* explicitly mentioned the least restrictive means requirement by name, but they did employ very similar language.[233] This requirement was not used by name in *United States v. Lee*,[234] and the Court also did not discuss it in *Smith* during its analysis of the *Sherbert* test.[235] However, the issue requires a closer inspection, and there is reason to believe the least restrictive means requirement did historically have a place in this jurisprudence, albeit a rather subtle one.

The Court eventually used this exact language in the free exercise context in *Thomas v. Review Board*, where it paired the compelling interest test with the least restrictive means requirement.[236] Long before this, the *Sherbert* Court indicated it would be incumbent upon the party defending the statute to show "that no alternative forms of regulation" would serve the same purpose without burdening the right of free exercise.[237] Similarly, language in *Yoder* referenced a similar idea—"only those interests of the highest order *and those not otherwise served*" may prevail over free exercise claims.[238] As Professor Thomas Berg has aptly pointed out, the Court later likened this language to the implementation of true strict

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231. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2792–93 (2014) (Ginsburg, J., dissenting).

232. *Smith*, 494 U.S. at 907–08 (Blackmun, J., dissenting) (emphasis added) (footnote omitted).

233. Berg, *supra* note 232, at 422–23.

234. *Lee*, 455 U.S. at 257.

235. *Smith*, 494 U.S. at 883–89.

236. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981).

237. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

238. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

scrutiny review for free exercise claims, including the least restrictive means requirement.[239]

If the *Sherbert* standard is reinstated, the Court will have to make a determination on this issue. Recently, in *Burwell v. Hobby Lobby*, the Court had occasion to address this very question (in the context of Religious Freedom Restoration Act), and it is clear there is a split of opinion. The *Hobby Lobby* majority maintained that pre-*Smith* jurisprudence did not include the least restrictive means standard,[240] while the dissent vigorously argued the standard *was* used prior to *Smith* and the Court's statement to the contrary in *Flores* was incorrect.[241] Because this question is one of interpretation, this issue will likely lead to a strong debate and be difficult to predict if the Court reconsiders its free exercise doctrine. However, it is important to keep in mind the corollaries between the compelling interest standard and the least restrictive means requirement. "[T]he least restrictive means component is a logical entailment of the compelling interest standard: if a less burdensome regulation will serve the government's interest, then the need to apply the more burdensome one is not compelling."[242] Professor Burg's analysis has strong logical force.

> The least restrictive means prong was not applied to exemption claims in a rigid or absolute fashion before Smith. Rather, this factor produced (as did the *Sherbert*/*Yoder* test overall) a balancing approach, with application of a general law qualifying as the least restrictive means if—but only if—other courses of regulation would significantly undermine the state's ability to protect its most important goals. This is a sensible, moderate, yet religion-protective approach.[243]

If the Court were to readopt the *Sherbert* test, it would do well to explicitly include the least restrictive means requirement in the new standards. This framework has proven itself a strong protector of religious liberty in the past as well as workable in application.[244] If any new interpretation aims to

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239. Berg, *supra* note 232, at 423 n.40. *See generally* Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136, 141–42 (1987) (discussing the application of strict scrutiny to free exercise claims and using *Sherbert*, *Thomas*, and *Yoder* as support).

240. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 n.18 (2014).

241. *Id.* at 2792–93 (Ginsburg, J., dissenting). In *Flores*, the Court stated summarily and without citation that RFRA "imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations." City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

242. Berg, *supra* note 232, at 423.

243. *Id.* at 424 (footnote omitted).

244. Interestingly, Justice Alito recognized how the least restrictive means requirement could impact the free exercise arena when he observed that if the standard had been applied

recognize the historical significance of the Free Exercise Clause and liberty of conscience, this "exceptionally demanding" standard could play a key role.[245]

3. The Importance of Preserving Doctrinal Flexibility

The *Yoder* Court spoke of the need to preserve doctrinal flexibility in order to achieve a rational application of the Religion Clauses of the First Amendment.[246] Such flexibility is needed now more than ever, and the *Sherbert* test is nothing if not fact intensive. *Sherbert* and *Yoder* represent careful, individualized judicial inquiries, yet this framework was abandoned in the name of judicial efficiency and practicality. While there is much to be said for the practical consideration of judicial efficiency, it is not a concept that may shape the interpretation of the First Amendment. Justice O'Connor stated:

> [t]o me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling . . . the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim.[247]

There is reason to believe the Court is currently shifting back in favor of such a philosophy in the broader realm of religious freedom, and the least restrictive means requirement (discussed above) could play an important role here as well. In *Hobby Lobby*, Justice Kennedy wrote a careful concurring opinion in which he pointedly emphasized that the government failed to satisfy the least restrictive means requirement mandated by RFRA.[248] While his remarks were tailored specifically to RFRA's application, he predicted the least restrictive means standard "might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate."[249] This point

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in a free exercise case like *Lee*, in which the statutory burden was upheld, the principle reason would have been because there was simply no less restrictive means available for the taxation requirement. *Hobby Lobby*, 134 S. Ct. at 2784.

245. *Id.* at 2780.

246. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

247. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring).

248. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

249. *Id.* at 2787.

was made after he emphasized the Court's fact specific holding.[250] In short, he seems to indicate he views the least restrictive means standard as a flexible device capable of distinguishing claims on a case-by-case basis. This is quite similar to Professor Berg's characterization of the standard as a sensible device for the protection of religious liberty.[251] Reading into Justice Kennedy's statements, there is reason to believe the least restrictive means standard could again assume such a role.

B. Addressing the Specter of Religious Pluralism

"Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[252] A similar thought was certainly on Justice Scalia's mind while writing the opinion in *Smith*.[253] However, the importance of free exercise deserves, and the First Amendment requires, a greater commitment to the purpose of the Free Exercise Clause and the protection of free conscience.

The *Smith* majority feared the continued application of the *Sherbert* line of cases might allow each conscience to become a law unto itself.[254] The problem is that this framework proved workable for some twenty-seven years. It characterizes the extension of the compelling interest doctrine as "courting anarchy" and lists a multitude of laws that would find themselves suddenly in constitutional jeopardy.[255] But the Court's examples are largely regulations easily justified by compelling governmental interests, and Justice O'Connor has forcefully made this point: "The Court's parade of horribles not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."[256] Would the government be able to demonstrate taxation is supported by a compelling interest justifying the free exercise burden on those who believe they should not have to pay them? The answer is obviously yes, and it has already met this burden in the pre-*Smith* era.[257]

Somewhere along the line, the debate on this issue has shifted from an emphasis on the importance of religious freedom to accusations of

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250. *Id.* at 2785.

251. Berg, *supra* note 232, at 423.

252. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

253. Duncan, *supra* note 66, at 853–54.

254. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

255. *Id.* at 888–89.

256. *Id.* at 902 (O'Connor, J., concurring).

257. United States v. Lee, 455 U.S. 252, 260 (1982) (holding that religious belief cannot serve as a basis for the nonpayment of taxes).

requests for "preferential treatment."[258] This is a very strange perspective. Seeking protection offered by free exercise of religion under the Free Exercise Clause is no more seeking preferential treatment than is asserting the right to freedom of expression under the Free Speech Clause. "Only beliefs rooted in religion are protected by the Free Exercise Clause which, by its terms, gives *special* protection to the exercise of religion."[259] Regardless of whether Smith's fears of religious pluralism are justifiable in the abstract, they are not justifiable in light of the Court's existing precedent,[260] and they are no more so today. "If the Free Exercise Clause is viewed as enacting a zero-sum game between democracy and religious pluralism, we will all lose something of inestimable value."[261]

V. THE RELIGIOUS FREEDOM RESTORATION ACT AND *HOBBY LOBBY*

As vitally important as the doctrinal interpretation of the First Amendment is, a thorough examination of the current state of free exercise law also requires a look beyond the Free Exercise Clause itself. The *Smith* decision caused significant changes in separate but related areas of the law in addition to its jurisprudential shift. The most important collateral consequence of *Smith* is the reaction it elicited from Congress in the form of the Religious Freedom Restoration Act ("RFRA"), enacted in November of 1993.[262] As the title implies, RFRA was a pointed, even bipartisan, response to the Court's decision in *Smith* three years earlier.[263] It reinstated the compelling interest requirement in an effort to override the *Smith* doctrine and the general applicability exception.[264]

Congress ensured RFRA's purpose was well understood by listing five findings that supported the statute's passage including the blunt statement that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[265] More importantly, the statute clearly states its purpose—to reinstate the *Sherbert* test.[266] However, it is vital to point out

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258. "In seeking an exemption from Hastings' across-the-board all-comers policy, CLS, we repeat, seeks preferential, not equal, treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause." Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 697 n.27 (2010).

259. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 713 (1981) (emphasis added).

260. Marshall, *supra* note 118, at 308–09.

261. Duncan, *supra* note 66, at 855.

262. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006).

263. Reyes, *supra* note 109, at 730.

264. 42 U.S.C. § 2000bb-1.

265. 42 U.S.C. § 2000bb(a).

266. The relevant portion reads:

> The purposes of this chapter are (1) to restore the compelling interest test as set forth in [Sherbert] and [Yoder] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

the text of the statute does more than merely revive the compelling interest requirement.[267] It reads: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the *least restrictive means* of furthering that compelling governmental interest."[268] The inclusion of the least restrictive means requirement, the significance of which was unclear with respect to pre-*Smith* law, has proven vitally important in RFRA's evolution.[269]

A. RFRA's Constitutionality and Applicability

Facially, RFRA was the simple solution to the *Smith* doctrine that Congress intended. In application, however, it had significant constitutional problems of its own that have severely limited its effectiveness. In *City of Boerne v. Flores*, the Court held RFRA, as applied to the states, exceeded the enforcement powers of Congress under the Fourteenth Amendment by attempting "a substantive change in constitutional protections."[270] Writing for the majority, Justice Kennedy succinctly explained the rationale:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[271]

The Fourteenth Amendment enforcement power is characterized as "remedial" for this reason.[272] An attempt to alter, rather than enforce, constitutional protections through the Fourteenth Amendment runs afoul of "vital principles necessary to maintain separation of powers and the federal balance," and RFRA, as applied to the states, was found guilty on this count.[273] After *Flores*, RFRA no longer provided an alternative cause of action for free exercise claimants burdened by state law which drastically

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(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government. 42 U.S.C. § 2000bb(b).

267. City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

268. 42 U.S.C. § 2000bb-1(b) (emphasis added).

269. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

270. *Flores*, 521 U.S. at 532.

271. *Id.* at 519 (quoting U.S. CONST. amend. XIV, § 5).

272. *Id.* (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

273. *Flores*, 521 U.S. at 536.

reduced its scope.[274] As a corollary, there is yet another important limitation on RFRA's application that has received only limited treatment in federal court.[275] RFRA's language states "government" shall not substantially burden religious exercise and appropriate relief may be obtained "against a government."[276] Thus, questions abound with respect to RFRA's application to suits between private parties. When it was addressed, it initially resulted in a miniature circuit split.[277] Both the Sixth[278] and Seventh[279] Circuits have expressly held that RFRA does not apply to such suits by interpreting its statutory language to require government action. The Ninth Circuit has also expressed doubts about RFRA's application to nongovernmental actors.[280] Only the Second Circuit, in *Hankins v. Lyght*, indicated it believes RFRA has application in suits between private parties.[281] However, this was in a very narrow context.[282] The division is, in reality, not much of a split as then Judge Sotomayor's dissent in *Hankins* is often cited to counter the majority's reasoning.[283] In fact, the Second Circuit later criticized the decision itself.[284] For all practical purposes, there are at least four circuits currently limiting RFRA's application to suits in which the government is a party, increasing its handicap twofold.

These restrictions essentially foreclose all but one of RFRA's applications.[285] RFRA originally was, and still is, applicable to the federal

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274. For further discussion of *Flores'* evaluation of the constitutionality of RFRA, see Martin S. Sheffer, *God Versus Caesar: Free Exercise, The Religious Freedom Restoration Act, and Conscience*, 23 OKLA. CITY U. L. REV. 929 (1998); While she agreed with the separation of powers analysis in *Flores*, Justice O'Connor took the opportunity to advocate that the Court "correct the misinterpretation of the Free Exercise Clause set forth in *Smith*" so it "would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause." *Flores*, 521 U.S. at 545 (O'Connor, J., dissenting). The Court of course declined to do so citing the same concerns proffered in *Smith*. *Id.* at 534–35 (majority opinion).

275. Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006).

276. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006).

277. For one of the most recent summaries of this case law in federal court, see *In re* Archdiocese of Milwaukee, 485 B.R. 385, 388–92 (Bankr. E.D. Wis. 2013).

278. Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 411–12 (6th Cir. 2010).

279. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006).

280. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999).

281. Hankins v. Lyght, 441 F.3d 96, 103 (2d Cir. 2006).

282. *Id.* (reasoning that since the statute at issue could have been enforced by a federal agency, RFRA could serve as a defense to that action regardless of whether it applies to suits between private parties more generally).

283. *McGill*, 617 F.3d at 411 (discussing the weight of the decision in *Hankins* and Judge Sotomayor's dissent in determining that RFRA does not apply to suits between private parties); *see also In re* Archdiocese of Milwaukee, 496 B.R. 905, 915 (Bankr. E.D. Wis. 2013).

284. Rweyemamu v. Cote, 520 F.3d 198, 203 n.2 (2d Cir. 2008).

285. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006).

government,[286] and it is in this context that the statute has secured a foothold.[287] In 2006, RFRA displayed its vitality in federal litigation in *Gonzales v. O Centro Espirita*, which involved the use of a sacramental tea regulated under the Controlled Substances Act.[288] The case involved facts strikingly similar to those in *Smith*, and RFRA's application proved dispositive.[289] Even though the government could point to a compelling interest for including the substance in the Controlled Substances Act, this was not enough to satisfy the "focused" inquiry mandated by RFRA because the *specific harm* at issue must be evaluated against the governmental interests.[290] *O Centro Espirita* proved RFRA could provide formidable protection for free exercise when its applicability requirements are met.

In practice, however, RFRA determines the outcome of only a narrow set of cases today, and the free exercise claims arising out of state regulation or private disputes are left to rely on state law as an alternative to the *Smith* doctrine.[291] Unless burdened by federal law, the typical free exercise claimant is unaffected by RFRA, and its role, while noteworthy, has not been of tremendous significance in free exercise law until recently.

B. RFRA and Corporate Free Exercise

There is one application of RFRA that merits special attention in light of recent litigation, and, here, there is reason to be a bit more hopeful about RFRA's dexterity. This application involves RFRA's protection of corporate free exercise in the context of the Affordable Care Act ("ACA"). The recent litigation involving the ACA and its controversial contraception mandate is a dramatic example of the continually evolving exploration of the strength and interpretation of RFRA by federal courts. After the Supreme Court upheld the ACA in *National Federation of Independent*

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286. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2006).

287. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *O Centro Espirita*, 546 U.S. 418.

288. *O Centro Espirita*, 546 U.S. at 423.

289. *See id.* at 432.

290. *Id.*

291. It is true that most free exercise claims are unaffected by RFRA today and so are still evaluated by the same standards that RFRA was enacted to change. However, there is one particular area in which free exercise claims are not in the same position, though not because of RFRA. Religious land use specifically has been altered greatly by another federal statute aimed at protecting particular free exercise concerns relating to religious land use and zoning laws. The Religious Land Use and Institutionalized Persons Act (RLUIPA) mandated that the compelling interest test be used in relation to land use regulations that burdened free exercise. 42 U.S.C. § 2000cc. For a discussion of RLUIPA and its impact in relation to free exercise claims, see Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001). *See also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003).

Business v. Sebelius,[292] a massive body of litigation over the contraceptive mandate became center stage.[293] The law's preventative care requirements mandate effected health plans to include the full range of FDA approved contraceptives, including intrauterine devices and "emergency contraceptives" described as "abortifacients" because they cause the demise of a fertilized embryo.[294] Numerous lawsuits were filed challenging the contraception mandate resulting in a divisive split among federal courts destined for Supreme Court resolution.[295] This split was eventually resolved on June 30, 2014, in *Burwell v. Hobby Lobby*,[296] but the road towards resolution was an interesting and eventful one.

1. RFRA's Application at the District Court Level

At the outset of this now gigantic body of litigation, it was clear corporations faced an exceedingly difficult task to prevail on their claims that the contraceptive mandate constituted a substantial burden on their exercise of religion under RFRA. The reception of these claims in federal district courts was largely unsympathetic, and litigants faced significant obstacles. The first major decision in this string of cases was *Hobby Lobby Stores v. Sebelius*.[297] Because the denial of Hobby Lobby's injunction in this case was, at first, upheld via interlocutory appeal by both the Tenth Circuit[298] and Supreme Court,[299] it quickly became *the* standard citation in subsequent opinions in district courts all over the country.[300] Essentially, the district court's decision was a wellspring for the body of law that reached the Supreme Court. It is, therefore, instructive to quickly examine the Court's treatment of Hobby Lobby's RFRA claim.

The plaintiff corporations, Hobby Lobby and Mardel, operate 514 arts and crafts stores and 35 Christian bookstores, respectively, and both are

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292. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

293. John K. DiMungo, *The Affordable Care Act's Contraceptive Coverage Mandate*, 35 NO. 1 INS. LITIG. REP. 5 (2013).

294. *Id.*

295. *Id.*

296. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

297. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

298. Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir. Dec. 20, 2012).

299. Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct 641 (2012).

300. For an array of cases citing the *Hobby Lobby* district court in their decision to deny temporary injunctions to the ACA, see Gilardi v. Sebelius, 926 F. Supp. 2d 273, 281 (D.D.C. 2013) (citing *Hobby Lobby* for the proposition that corporations do not pray or worship); Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1115–16 (D. Colo. 2013) (citing *Hobby Lobby* in its denial of the same injunction); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 412–13 (E.D. Pa. 2013) (citing *Hobby Lobby* to hold that corporations do not enjoy free exercise rights); Grote Indus., LLC v. Sebelius, 914 F. Supp. 2d 943, 949–50 (S.D. Ind. 2012) (citing *Hobby Lobby* in deciding any burden on free exercise caused by the ACA mandate was not substantial).

owned and operated by the Green family in accordance with their religious faith.[301] Hobby Lobby and Mardel argued the mandatory provision of abortifacients is a substantial burden on free exercise in violation of RFRA[302] among other things.[303] Before this claim could be reached on the merits, the litigants encountered what would become the foremost obstacle in similar litigation throughout the federal court system—RFRA's application to the corporate form. Parsing statutory language, the district court sidestepped the fact that federal law statutorily defines the term "person" to include corporations and held the act inapplicable.[304] The court reasoned, "[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."[305] Bolstered by this conclusion, the court declined to enjoin to the mandate's enforcement.[306]

Members of the Green family also asserted RFRA claims on behalf of themselves.[307] Theoretically, their RFRA claims should stand a much better chance of success than the claims of the corporations. However, the corporate aspects of the Green's claim invaded the analysis of their individual argument under the substantial burden prong of the RFRA.[308] The court employed an incredibly strict substantial burden requirement

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301. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284–85 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

302. *Id.* at 1285.

303. The Greens, of course, also argued that the mandate violated their rights under the Free Exercise Clause itself but to no avail. *Id.* at 1285, 1287. The court announced that "the rights of corporate persons and natural persons are not coextensive," seizing upon a distinction between constitutional rights available to corporations and "personal" rights available only to individuals. *Id.* at 1287–88 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)). Since Hobby Lobby and Mardel are not religious organizations, the court reasoned they could not have rights under the Free Exercise Clause. *Id.* at 1288.

304. *Id.* at 1291. *See also* 1 U.S.C. § 1.

305. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

306. *Id.* at 1296–97.

307. *Id.* at 1292.

308. *Id.* at 1293. To make a prima facie claim for a RFRA violation under Tenth Circuit precedent, a claimant must prove (1) a substantial burden imposed by the government, (2) on a sincere, (3) exercise of religion. *Id.* at 1292 (citing Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)); As previously discussed, this is one of the most troubling aspects of forcing claimants to rely on a federal statute, or any statute, rather than the First Amendment. Instead of the government bearing the burden of proving a compelling interest to justify the regulation of free exercise, the claimant has the burden of proving the existence of what was a constitutionally protected right in a statutory cause of action

taken from existing Seventh Circuit precedent.[309] Accordingly, a burden is only substantial if it, "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . impracticable."[310] Under this stringent test, it is no wonder the court found it unlikely that a substantial burden could be established because the relationship between the ACA mandate and the burden on free exercise was too "indirect and attenuated."[311]

This litigation ultimately proved itself a perfect opportunity for RFRA to once again become relevant in the protection of free exercise, but the initial returns, represented by the district court opinion in *Hobby Lobby v. Sebelius*, were certainly not encouraging. It was only at the Circuit Court level that litigants enjoyed a more favorable interpretation of RFRA, and, even then, such decisions were in the minority.[312]

2. RFRA's Circuit Split

Treatment of RFRA's application to for-profit corporations continued as the main point of contention at the circuit level, and the majority of courts found the statute inapplicable.[313] While the Tenth Circuit reversed the denial of the injunction in *Hobby Lobby v. Sebelius*,[314] the district court's reasoning resonated nonetheless in other circuits. After quoting the *Hobby Lobby* district court's statement regarding the inability of corporations to pray and worship separate from their owners, the Third Circuit in *Conestoga Wood* demonstrated its rather jejune rationale:

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309. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

310. *Id.* (quoting Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)). The current ACA litigation is not the only area in which such a restrictive interpretation of the substantial burden inquiry has been employed. *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); *Civil Liberties for Urban Believers*, 342 F.3d 752.

311. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). *See also* Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1117 (D. Colo. 2013) (finding that the ACA mandate does not prevent plaintiff from personally exercising religion and that any burden on individual free exercise is "slight and attenuated").

312. *See infra* note 317.

313. Three of the five circuit courts to consider the issue either found that a for-profit corporation could not exercise religion or did not qualify as a person under RFRA. *See* Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208 (D.C. Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013). Two circuits found RFRA applicable. *See* Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

314. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

> [o]ur conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim. We thus need not decide whether such a corporation is a 'person' under the RFRA.[315]

While the analytical foundation for this conclusion varied slightly in other circuits and employed more nuance, the fundamental premise remained largely the same.[316] The *Hobby Lobby* district court's austere substantial burden analysis received much less attention. This was largely a consequence of procedure since this question was not reached in cases where RFRA was found inapplicable.[317] The three circuits that did reach the substantial burden issue attributed much more weight to the stringent standard required by the statute.[318]

Ironically, *Hobby Lobby v. Sebelius*, was the first circuit decision to expressly hold that at least some corporations qualified as persons capable of exercising religion under RFRA.[319] In a sweeping reversal of the district court, the Tenth Circuit found not only that the Dictionary Act's[320] inclusion of corporations in the meaning of "persons" was sufficient to warrant RFRA's application but, also, the right of free exercise is not so purely personal as to make it unavailable at least to some corporate forms.[321] The court also pointedly questioned the foundational validity of the alternative interpretation.[322] While the Tenth Circuit decision was a major reversal, three other circuits expressed views similar to that of the

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315. *Conestoga Wood*, 724 F.3d at 385–88.

316. *See Gilardi*, 733 F.3d at 1211–12 (stating that to determine whether a corporation may qualify as a person under RFRA, the corporation's capability to exercise religion must first be addressed); *Autocam*, 730 F.3d at 625 (agreeing with *Conestoga Wood* that a corporation cannot assert a claim under RFRA because a corporation is not a person as defined in the statute and cannot exercise religion).

317. *Autocam*, 730 F.3d at 625–26 (forgoing the substantial burden analysis because Autocam did not qualify as a person under RFRA); *Conestoga Wood*, 724 F.3d at 388–89 (finding it unnecessary to address the substantial burden analysis since the corporation could not assert a claim under RFRA and the owners could not assert their own free exercise rights through their business).

318. *Korte*, 735 F.3d at 683; *Gilardi*, 733 F.3d at 1218; Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1141 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

319. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1129 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

320. The Dictionary Act, as its name implies, is a broad collection of definitions for terms used in federal statutes. The Act itself states that its definitions should be used to determine "the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1.

321. *Id.* at 1133–37.

322. *Id.* at 1137 n.12.

Hobby Lobby district court,[323] and the opinion received widely disparate reactions from commentators in the interim between the decision and the Supreme Court's ruling in June.[324]

C. *Burwell v. Hobby Lobby*

The Supreme Court's decision in *Burwell v. Hobby Lobby*[325] was a consolidation of *Hobby Lobby v. Sebelius*[326] and *Conestoga Wood*.[327] In total, it involved the claims of three closely held corporations: Hobby Lobby and Mardel, both owned by the Green family, and Conestoga Wood Specialties, a Pennsylvanian wood-working company owned by the Hahn family.[328] Failure to comply with the contraception mandate would cost Hobby Lobby, Mardel, and Conestoga Wood an estimated $475 million, $33 million, and $15 million respectively in annual fines under the ACA.[329] Given the apathetic treatment of the corporate claims by a majority of the circuit courts,[330] the Supreme Court's analysis of RFRA can be characterized as surprising. Even more surprising to many was that Justice Alito authored the majority opinion which many believed would belong to Justice Kennedy, long thought to be the lone swing vote in the case, or to Chief Justice Roberts.[331] Nevertheless, Justice Alito's opinion dealt authoritatively with RFRA's application and interpretation with respect to corporate claims.

323. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

324. For a critical analysis of the Tenth Circuit's decision in *Hobby Lobby*, see Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 8–12 (2014). For an alternative perspective, see Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014).

325. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

326. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

327. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377 (3d Cir. 2013).

328. *Hobby Lobby*, 134 S. Ct. at 2764–66.

329. *Id.* at 2775. The businesses are fined $100 per day for each qualifying individual if they continue their practice of offering group health plans without covering the required contraceptives. This amounts to $1.3 million per day for Hobby Lobby, $90,000 per day for Mardel, and $40,000 per day for Conestoga Wood. *Id.*

330. *See Conestoga Wood*, 724 F.3d 377.

331. *See* Mark Walsh, *A "view" from the Court: Justice Alito has his day in finale*, SCOTUSBLOG (Jun. 30, 2014, 5:08 PM), http://www.scotusblog.com/2014/06/a-view-from-the-court-justice-alito-has-his-day-in-finale/; Lyle Denniston, *Argument recap: One Hearing, two dramas,* SCOTUSBLOG (Mar. 25, 2014, 4:50 PM), http://www.scotusblog.com/2014/03/argument-recap-one-hearing-two-dramas/.

1. RFRA's Corporate Application

Finally answering the most divisive question of the contraceptive mandate litigation, the Court found RFRA did in fact apply to for-profit, *closely held* corporations.[332] Recognizing such a significant limitation on RFRA's application would have "dramatic consequences," thus, the majority reasoned the forfeiture requirement of RFRA's protection of religious liberty to benefit from the corporate form was inconsistent with the statute's broad mandate.[333] After discussing the inclusion of corporations in the Dictionary Act's definition of "person," the Court observed that nonprofit corporations had repeatedly (and successfully) brought claims under RFRA. The Court ultimately decided the nonprofit/for-profit distinction was not the dividing line Congress intended.[334] "No known understanding of the term 'person' includes *some* but not all corporations. The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations."[335] The Court also carefully pointed out its decision applied only to closely held corporations as none of the businesses before the Court were publicly traded; although, interestingly, the above rationale extends to this distinction as well.[336]

Strict statutory interpretation aside, the principal argument that RFRA could not encompass for-profit corporations was simply that such entities are incapable of exercising religion.[337] This was argued largely because of the profit motive itself.[338] Yet, the Court maintained that general corporations may be created for any lawful purpose, including the advancement of humanitarian and religious objectives.[339] Since the authenticity of religious belief was unchallenged,[340] the Court rejected an interpretation that would allow a nonprofit corporation to exercise religion and prohibit RFRA application to those operating for-profit.[341]Essentially,

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332. *Hobby Lobby*, 134 S. Ct. at 2775.
333. *Id.* at 2767.
334. *Id.* at 2768.
335. *Id.* at 2769.
336. *Id.* at 2774.
337. *Hobby Lobby*, 134 S. Ct. at 2774.
338. *Id.* at 2770 n.23.
339. *Id.* at 2770–71.
340. *Id.* at 2774.
341. The Court also dispelled of the argument that RFRA could not be read as protecting the free exercise of corporations because it merely codified the pre-*Smith* jurisprudence and was not intended to recognize new claims not already in existence. The enactment of the Religious Land Use and Institutionalized Persons Act amended RFRA in an effort to distance it from First Amendment law after *Flores*. This amendment deleted the reference to the First Amendment and independently defined the exercise of religion for

the majority adopted a rational, common sense approach to an issue which hamstrung multiple federal courts, and there is much to be said for this. The ability of an entity to exercise religion is present or absent, important or unimportant based solely on the existence of a profit motive. To be sure, stating that any corporation has rights coterminous with individuals, or indeed any rights at all, is a legal fiction.[342]

> [Yet,] it is important to keep in mind that the purpose of this fiction is to provide protection for *human beings*. A corporation is simply a form of organization used by human beings to achieve desired ends . . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[343]

Such a point seems fundamental, but it took Supreme Court litigation to gain recognition. Regardless, this characterization is drastically important. To make this point clear, Justice Alito cited the now infamous passage from the *Hobby Lobby* district court opinion declaring corporations unable to separately hold religious beliefs, pray, or worship.[344] Justice Alito's response forcefully cut through the hyperbole. "All of this is true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[345]

2. RFRA's Substantive Interpretation

Having resolved the applicability issue, the Court was now free to address RFRA's standards and the merits of the claims before it. At this point, the majority drew a clear line in the sand regarding the substantial burden inquiry. "Because the contraceptive mandate forces them to pay an enormous sum of money . . . if they insist on providing insurance coverage

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purposes of the statute, and this indicated that RFRA's interpretation was not to be tied to pre-*Smith* case law. *Id.* at 2772–74.

342. *Hobby Lobby*, 134 S. Ct. at 2768.

343. *Id.* (emphasis added).

344. *Id.*

345. *Id.* (quoting Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)); This point has generated quite a lot of debate from commentators. For both perspectives see David Post, *What's wrong with the Hobby Lobby decision*, THE VOLOKH CONSPIRACY (July 9, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/09/whats-wrong-with-the-hobby-lobby-decision/; and Llya Somin, *Corporations and the "free exercise" of religion – response to David Post*, THE VOLOKH CONSPIRACY (July 10, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/10/corporations-and-the-free-exercise-of-religion-response-to-david-post/.

in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."[346] The Court clearly stated it would not evaluate the reasonableness of the plaintiff's claim that the forced provision of abortifacients in company health plans was against their religious beliefs. The Court stated the indirectness of the burden and the reasonableness of the religious beliefs, an important issue at the lower levels,[347] was something federal courts had "no business addressing."[348]

The Court's consideration of the compelling interest standard was rather short, and it assumed the provision of the contraceptives at issue was a sufficient interest.[349] The more consequential portion of the Court's analysis of RFRA's standards was its focus on the last element: the least restrictive means requirement.[350] In some respects, this was another surprise from *Hobby Lobby* because the government devoted most of its efforts to the compelling interest standard.[351] In fact, the least restrictive means requirement of RFRA received very little treatment at the circuit court level.[352] Thus, by relying on this portion of the RFRA standard, the Supreme Court's analysis largely turned on an issue not fully addressed in lower courts. Interestingly, once the focus of the Court shifted to the least restrictive means standard, the government essentially fell on its own sword.

The least restrictive means requirement is "exceptionally demanding" and mandates the government show there is no other alternative to achieving its goals other than imposing the current burden on the plaintiff's exercise of religion.[353] The government simply could not do

346. *Hobby Lobby*, 134 S. Ct. at 2779.

347. *See* Briscoe v. Sebelius, 927 F. Supp. 2d 1109, 1117 (D. Colo. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

348. *Hobby Lobby*, 134 S. Ct. at 2777–78.

349. *Id.* at 2779–80.

350. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b)(2) (2006).

351. Brief for Petitioners at 37–58, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) (After thoroughly addressing the government's argument about RFRA's application to corporations, Solicitor General Verrilli's brief spent twenty pages on the compelling interest portion of RFRA but only slightly over one page on the least restrictive means portion.). *See also infra* note 357.

352. Most circuits did not address the least restrictive means portion of the RFRA standard, and, even where it was addressed, its examination was often subservient to that of the compelling interest requirement. *See* Korte v. Sebelius, 735 F.3d 654, 685–87 (7th Cir. 2013) (evaluating the least restrictive means requirement together with the compelling interest requirement and noting that the government "has not made *any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals . . . ."); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (stating that the government failed to address why an accommodation from the contraception mandate would frustrate its goals and thus why there could not be a less restrictive means of achieving them).

353. *Hobby Lobby*, 134 S. Ct. at 2780.

this with respect to the contraception mandate because it had already created a built-in exemption for employers like churches and nonprofit organizations openly religious in nature.[354] Moreover, the ACA itself does not apply to employers with fifty or less employees, resulting in the exemption of thirty-four million people, and a tremendous number of health insurance plans were grandfathered in under the ACA.[355] From this perspective, the government could not argue that imposing the contraceptive mandate on *this* subset of employers was the least restrictive means of achieving its goals,[356] and this is very likely why the government shunned this portion of the RFRA analysis throughout the litigation. In fact, the government put forth no argument why it simply could not cover these costs itself.[357] Ultimately, "[Health and Human Services] itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs," and thus, "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA."[358]

3. Justice Kennedy's Concurrence

Justice Kennedy's concurring opinion is noteworthy on several levels. It primarily underscores the narrowness of the majority opinion in light of the mordant assertions of the dissent.[359] The opinion is relatively short, and there is no mistaking its purpose: to underline "that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent," and Justice Kennedy is certainly correct.[360] Indeed, the majority takes great care to explain this point.

> Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.[361]

Therefore, when Justice Kennedy reinforces this narrowness in his concurrence, it is relatively clear he will not regularly find exemptions to

354. *Id.* at 2763.
355. *Id.* at 2763–64.
356. *Id.* at 2782.
357. *Id.* at 2780.
358. *Hobby Lobby*, 134 S. Ct. at 2782–85.
359. *See id.* at 2787 (Ginsburg, J., dissenting).
360. *Id.* at 2785 (Kennedy, J., concurring).
361. *Id.* at 2783 (majority opinion).

governmental regulations through RFRA because there may be many other cases "in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an *alleged* statutory right of free exercise."[362] This certainly is a sobering reminder to those who might view *Hobby Lobby* as a fundamental revitalization of RFRA that will continue to ripple through the free exercise landscape.

Furthermore, Justice Kennedy's concurrence displays how important the existing ACA exemptions are to the outcome of the case. As mentioned earlier, he was thought to be the lone swing vote in the case with the other eight Justices evenly and solidly divided.[363] His concurrence certainly seems to prove this theory correct, but that is not the pertinent point here. What truly matters is the future of RFRA's interpretation in the wake of *Hobby Lobby*, and this is why Justice Kennedy's perspective is uniquely significant. The other four members of the majority may well have found a violation of RFRA without the existing exemptions under the ACA.[364] Justice Kennedy, however, made evident that the existence and implementation of workable exemptions to the contraceptive mandate alone prompted him to vote the way that he did. "But the Government has not made the second showing required by RFRA . . . the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that [Health and Human Services ("HHS")] has itself devised . . . ."[365] Justice Kennedy also took issue with the fact it was an agency (HHS) making the distinction rather than Congress itself, stating "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation."[366] Together, these cautionary statements both publicly recognize the dissent's objections and provide a clear signal that future RFRA applications, without such a convenient example of a workable alternative, may not find the Court, and especially Justice Kennedy, so receptive.[367] This, together with his emphasis on the narrow, fact intensive

362. *Id.* at 2787 (Kennedy, J., concurring) (emphasis added).

363. Denniston, *supra* note 335.

364. The majority seems to indicate that it was not entirely taken with the compelling interest argument put forth by the government, and it is possible that at least the other four members of the majority could have found against the government on this issue as well. *See Hobby Lobby*, 134 S. Ct. at 2779–80. Yet, it seems very unlikely that Justice Kennedy would have joined the opinion if this were the only ground on which a RFRA violation was founded. *See id.* at 2785–87 (Kennedy, J., concurring).

365. *Id.* at 2786 (Kennedy, J., concurring).

366. *Id.*

367. *See generally* Linda Greenhouse, Op-Ed., *Reading Hobby Lobby in Context*, N.Y. TIMES, July 9, 2014, http://www.nytimes.com/2014/07/10/opinion/linda-greenhouse-reading-hobby-lobby-in-context.html (discussing Justice Kennedy's influence on future applications of RFRA in light of his concurrence).

nature of the opinion, necessitates a much more cautious prediction about how the Court will interpret RFRA with respect to future claims.

Overall, there is no doubt that *Hobby Lobby* is an important decision both for the protection of corporate conscience[368] and, more generally, for the betterment of modern free exercise. However, its benefit for the free exercise claimant is limited by RFRA's narrow application. While the Court's application of RFRA to for-profit, closely held corporations was the headline of the *Hobby Lobby* decision, the revival of the substantial burden analysis and the weight to which the Court ascribed to the least restrictive means requirement may actually prove to be the most important and long lasting effect of the decision. Practically, the Court's recognition of RFRA's mandate and its strict interpretation of these standards will likely have more widespread application than RFRA's inclusion of closely held corporations.[369] This interpretation will find its way into courts across the country in all manner of suits, not just those involving corporations.[370] Thus, *Hobby Lobby* will greatly affect even individual RFRA claims against the federal government, and this is possibly the decision's greatest contribution to the protection of free exercise. To be sure, RFRA's application is still limited, but when it is available, the *Hobby Lobby*'s interpretation will guide the analysis.

VI. LOOKING PAST *HOBBY LOBBY* TO THE PROTECTION OF CORPORATE FREE EXERCISE UNDER THE FIRST AMENDMENT

Hobby Lobby corrected a flawed interpretation of RFRA's applicability and dramatically increased the importance of its least restrictive means requirement. It also addressed some preconceived notions regarding corporate ownership and religious exercise. What it did not do is alter existing Free Exercise Clause jurisprudence, nor should it have. *Hobby Lobby* is a RFRA case, not a Free Exercise Clause case.[371] As Justice Alito might say, its effect on the Free Exercise Clause interpretation

368. The author hesitates to use this term. As shorthand, it effectively denotes the idea of the corporate right of free exercise. However, as a purely descriptive term, it mischaracterizes the essential interest protected by the recognition of corporate free exercise, which is the protection of individual free conscience. Therefore, use of this term should not be read to mean that the corporation in some strange way has a conscience of its own, but that the corporation is entitled to free exercise rights for the sake of its owners.

369. *See generally* Douglas Laycock, Op-Ed., *The Religious Freedom Act Worked the Way It Should*, N.Y. TIMES, July 1, 2014, *available at* http://www.nytimes.com/roomfordebate/2014/06/30/congress-religion-and-the-supreme-courts-hobby-lobby-decision/the-religious-freedom-act-worked-the-way-it-should.

370. The decision also may well affect the interpretation of state RFRAs by state courts. While these are separate statutes, the interpretation of which are not dependent on the federal model, the Court's rationale will almost certainly seep into some state interpretations.

371. There was a Free Exercise claim raised by Conestoga Wood and its owners, the Hahns, but the Court did not reach this claim. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

is "precisely zero."[372] Nor did it alter any form of free exercise protection for those burdened by state law since RFRA remains inapplicable to the states.[373] *Hobby Lobby* added a fresh dose of reason to a tangled web of circuit precedent surrounding the ability of the closely held corporation to exercise religion within the meaning of RFRA.[374] Therefore, any characterization of the decision as a fundamental alteration of modern free exercise law is misplaced. The decision is a narrow one and highly fact specific, as Justice Kennedy was careful to point out.[375] The litigation itself was the result of an unusual federal law with rather unique consequences. Nevertheless, there are significant analogies to be made between RFRA's application to the corporate form and the argument for recognition of free exercise rights for corporations under the First Amendment. Based on the Court's rationale, there is reason to believe this is the next logical step in the present progression.

Two major arguments can be made on this front. First, given the Court's analysis concerning RFRA's protection of the closely held corporation, there is little logical distinction between this application and a similar interpretation of the Free Exercise Clause. Second, such an interpretation is consistent with other Supreme Court precedent regarding the extension of First Amendment rights to the corporate form. This latter issue has only recently been explored in federal litigation.[376]

A. Why is this Argument Even Necessary?

One might well ask why there is a need for the protection of corporate free exercise rights under the First Amendment given the Court's decision in *Hobby Lobby*. At first glance it certainly may seem unnecessary, but, practically, there are multiple reasons why the Court should move in this direction. First and foremost, there is a vast discrepancy in the protection of closely held corporations as the law currently stands. Companies regulated by federal law who sue the federal government will have the benefit of the Court's reinvestment in RFRA's importance. Whether their various RFRA claims will prove successful is

372. *Id.* at 2760.

373. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

374. *Hobby Lobby*, 134 S. Ct. at 2768.

375. *Id.* at 2785 (Kennedy, J., concurring).

376. This issue was often a case of first impression at the circuit court level. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 383 (3d Cir. 2013). Its treatment differed greatly. *Compare* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) ("We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."), *with* Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1214 (D.C. Cir. 2013) ("No such *corpus juris* exists to suggest a free-exercise right for secular corporations. Thus, we read the 'nature, history, and purpose' of the Free Exercise Clause as militating against the discernment of such a right.").

impossible to predict, but the salient point is that these companies will have a solid basis on which to assert their claims. On the other hand, closely held corporations regulated under state law that wish to assert similar claims against state governments do not have the benefit of RFRA's protection.[377] *Hobby Lobby*, therefore, has no direct impact on these companies. To be sure, a fair number of states have their own version of RFRA, and there is little doubt that the interpretation of these statutes will be influenced by *Hobby Lobby*'s rationale.[378] Nevertheless, most states do not have such statutes, and this incongruent application *will* cause litigation and possibly produce a divided body of law similar to the one that lead to the Court's decision in *Hobby Lobby*.

The inclusion of corporate free exercise within the strictures of the Free Exercise Clause will also provide greater certainty to the protection of this right. *Hobby Lobby* may well have been a major victory for closely held corporations that might assert religious claims simply because such claims now have a foundation. However, it is far from certain that new RFRA claims will enjoy any significant success once removed from the specific facts of the ACA contraception mandate. There are strong reasons to believe that the Court's future RFRA decisions may not be as receptive to challenges of federal law where alternative schemes are less obvious. In *Hobby Lobby*, the Court explicitly relied on the numerous pre-existing exceptions to the ACA mandate to prove a lesser restrictive statutory scheme could eliminate the religious burden.[379] Justice Kennedy's position is most precarious of all. He made a clear effort to credit the dissent and point out that there will be cases "in which it is more difficult and expensive to accommodate a governmental program to countless religious claims," and thus, his decision to join the majority was heavily fact specific.[380] In the future, viable alternatives often will not present themselves so readily, and it may be much more difficult to garner a majority of the Court. If this is the case, *Hobby Lobby* and its interpretation of RFRA may provide significantly less protection than first thought, leaving a need for the inclusion of these corporations in the Free Exercise Clause.

Finally, with the prospect of litigation by closely held corporations outside the current scope of RFRA protection, there is a tremendous opportunity for a reinvigoration of free exercise debate across the country. In the interim between *Smith* and the initiation of the contraceptive mandate litigation, the significance of the Free Exercise Clause has been at an all time low and the broader free exercise discussion had become stagnant. If the issue of corporate free exercise was to reach the Supreme Court before

377. Recall, in *Flores*, the Court found RFRA unconstitutional as applied to the states. *Flores*, 521 U.S. at 536.

378. *See supra* note **Error! Bookmark not defined.**.

379. *Hobby Lobby*, 134 S. Ct. at 2782.

380. *Id.* at 2787 (Kennedy, J., concurring).

it has the opportunity to reconsider *Smith*, it would provide an additional opportunity to reexamine the entire free exercise framework in the way that the *Hobby Lobby* case provided an opportunity to reexamine RFRA. Even if these claims flounder languorously in the lower federal courts, there will, at a minimum, be a careful analysis of the *Hobby Lobby* rationale and its application to the Free Exercise Clause, and this will be a positive development for free exercise law.

B. *Hobby Lobby*'s Rationale and the Free Exercise Clause

Hobby Lobby did not address the application of its analysis to existing Free Exercise Clause doctrine,[381] and the Supreme Court has never addressed this issue.[382] Given the recent developments in the area of corporate free speech, that is not so surprising.[383] Statutory analysis obviously entails vastly different interpretational considerations.[384] Accordingly, one must be attentive in analogizing RFRA's statutory support of corporate religious exercise with constitutional free exercise. That cautionary note aside, there are important parallels to be made. One of the most fundamental precepts of the *Hobby Lobby* decision is that corporate rights are created for the protection of the individuals associated with the corporation.[385] This is a practical minded view applicable both to statutory and constitutional rights.[386]

One of the principal bases for the denial of RFRA's application to the corporate form at the circuit court level was the fact corporations are not living beings and, therefore, cannot exercise religion in any tangible sense.[387] The logical force of this argument was found wanting in *Hobby Lobby*, and it should fare no better in the First Amendment context.[388] "[I]t is important to keep in mind that the purpose of this fiction is to provide

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381. *See supra* note 376 and accompanying text.

382. Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012). *See supra* note 381.

383. *See generally* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the right to participate in political speech cannot be denied on the basis of the corporate structure).

384. Necessarily, statutory interpretation involves careful consideration of congressional intent, legislative history, and individualized canons of interpretation. The Court's statutory analysis in *Hobby Lobby* was no different. Supporting statutes like the Dictionary Act and the Religious Land Use and Institutionalized Persons Act played an important role. The relevant comparison made here is not that there is direct precedential value in the *Hobby Lobby* decision with regard to the Free Exercise Clause. It is simply a logical extension of the underlying rationale with respect to the ability of a closely held corporation to exercise religion that is being examined.

385. *Hobby Lobby*, 134 S. Ct. at 2768.

386. *Id.*

387. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 385–88 (3d Cir. 2013).

388. *Hobby Lobby*, 134 S. Ct. at 2768.

protection for human beings."[389] Derisive remonstrations that corporations have no soul and cannot believe or otherwise function on their own prove little in debating the propriety of granting free exercise rights to closely held corporations. While this sentiment infected the adjudication at lower levels,[390] the rationality of Justice Alito's response is compelling: "All of this is true—but quite beside the point."[391] A closely held corporation does not need the protection of the free exercise clause for its building, its charter, or it tax status. In fact, *it* does not need such protection at all. It is the protection of the religious freedom of the owners that is deserving of recognition whether or not they choose to operate their business in the corporate form. This decision says nothing about the religious character of any individual.[392] Thus, there is no reason to grant religious protection to the sole proprietor, yet, deny protection to the sole shareholder while the two conduct the same activities.[393]

The for-profit, non-profit distinction similarly cannot justify the denial of corporate free exercise rights. The argument put forth by some courts is that for-profit corporations cannot exercise religion because their sole purpose is to make money, as if one necessarily excludes the other.[394] "This flies in the face of modern corporate law."[395] Corporations can exist for any lawful purpose including the promotion of philanthropic, charitable, and humanitarian causes.[396] Fundamentally, the religious nature of a corporation, or indeed any business, cannot be judged by its outward characteristics, and the protection of religious liberty should not be based on such facile considerations. The free conscience of the individual is the relevant liberty interest and the fact a given business operates for profit does not alter this consideration.

Corporate law and the corporate form more generally is a device created to promote the efficient use of capital and encourage market participation. What justification exists then for requiring the choice between the forfeiture of free exercise rights and the benefits of incorporation? The Court has recognized that "[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[397] The denial of free exercise protection simply

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389. *Id.*

390. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

391. *Hobby Lobby*, 134 S. Ct. at 2768.

392. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

393. *Id.*

394. *Hobby Lobby*, 134 S. Ct. at 2770 n.23.

395. *Id.* at 2770.

396. *Id.* at 2771.

397. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 351 (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

because an individual or a group of individuals wish to conduct the affairs of their corporation in a manner that is consistent with sincerely held religious belief is such a forfeiture. Indeed, from an economic perspective, the lack of respect for the religious autonomy of the closely held corporation could be seen as a barrier to those with strong religious convictions who might otherwise participate in the market utilizing the corporate form and an advantage to those for whom this is not a factor.[398] The *Hobby Lobby* majority recognized that such a business must, "either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations."[399] The argument for recognition of corporate religious autonomy under the First Amendment is not a plea for preferential treatment or an elevation of the corporation's importance. It is a case for the recognition of the right to free exercise of religion for the *individual* in all walks of life.

1. Authenticity of Belief

Corporations, like Hobby Lobby and Conestoga Wood, do not choose to marry corporate decision-making and religious faith in a vacuum. Very often there are serious financial consequences associated with such decisions, and these decisions shape the image of the company in the court of public opinion. Yet such decisions are made nevertheless, and this points to sincerity and authenticity of religious belief. Authenticity is a key issue because it removes any doubt concerning the motivation of a secular, for-profit corporation conducting its affairs in alignment with religious faith. The financial ramifications for the companies in *Hobby Lobby* were dramatic as they faced tens of millions of dollars in fines per year under the ACA if their litigation did not succeed.[400] Businesses like Hobby Lobby risk limiting their customer base, incurring significant costs in daily operations, and amassing huge legal fees all because of religiously motivated decisions.[401] There is no reason to think its stance reflects anything other than sincerely held religious beliefs.[402] Interestingly, nearly every court that has considered these claims, including those that rejected them, explicitly noted the authenticity of a business's religious belief was

398. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 60 (1989).

399. *Hobby Lobby*, 134 S. Ct. at 2767.

400. *See supra* note 333 and accompanying text.

401. *See generally* Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, N.Y. TIMES, Jan. 26, 2013, *available at* http://www.nytimes.com/2013/01/27/health/religious-groups-and-employers-battle-contraception-mandate.html?pagewanted=all (stating that Hobby Lobby runs its stores according to biblical principles, closes on Sundays, pays employees nearly double the minimum wage, and provides comprehensive health coverage).

402. *See Press Statement of David Green*, THE BECKETT FUND FOR RELIGIOUS LIBERTY (Sept. 13, 2012), www.becketfund.org/davidgreenpressstatement/.

unquestioned.[403] If this is the case and the religious claims of corporate ownership are genuine, then there is no basis on which to distinguish these claims from those of the individual with no corporate association, and such regulations should be subject to free exercise review just like any other.[404] Is it worth denying protection for authentic claims simply because there could be entities that attempt to take unfair advantage? Surely it is far better to protect authentic belief and trust the judiciary to recognize the insincere opportunist. Courts have already recognized this duty, and there is no reason to think them incapable in this context.[405]

2. A Limitation on Scope

The Supreme Court limited its application of RFRA to the only types of businesses before the Court in *Hobby Lobby*: closely held corporations.[406] Given the opportunity, there is good reason to believe it can employ this same limitation with respect to the Free Exercise Clause. This, of course, would lead to the exclusion of the publicly traded company, but this delineation could prove highly useful. It may also be the only possible framework.

However, this does not mean such an interpretation will be any less effective. For one, there is likely little need for the inclusion of the publicly traded company. By definition, these companies are owned by large numbers of diverse individuals, and the actions of their officers and boards of directors are carefully regulated by corporate law. Their duty is to the best interest of the company, and it seems highly unlikely that this type of corporation would wish to assert religious rights.[407] The real need lies with the closely held corporation in which there is often a small body of unified ownership. By way of example, each of the three companies involved in the *Hobby Lobby* litigation are owned and operated by members of a single family.[408] A free exercise limitation that recognizes this reality could help garner a majority of the Court while still serving the interests of those most likely to bring such claims. In this way, the distinction drawn in *Hobby Lobby* could serve as a guidepost for a similarly limited holding in the context of the Free Exercise Clause, if such issue came before the Court, and such a limit would almost certainly increase the likelihood of success.

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403. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1216 (D.C. Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 389 (3d Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

404. Lupu, *supra* note 254, at 978–80.

405. *See Korte*, 735 F.3d at 683.

406. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014).

407. *Id.*

408. *Id.*

Ultimately, the Court's rationale in *Hobby Lobby* provides a powerful foundation for the recognition of corporate free exercise rights under the First Amendment. When limited to closely held corporations, there are numerous parallels between the analysis of corporate religious exercise under RFRA and the protection of corporate free exercise under the Free Exercise Clause. The businessman can act in accordance with religious faith and free conscience while conducting the affairs of his company just as surely as when he acts for himself, and the current assumptions to the contrary stand in stark contrast to the historical reverence of the right of free exercise. *Hobby Lobby* could well prove a watershed in this area, beginning the transition to a new outlook on the Free Exercise Clause, but there are still a great many briefs to be written before that takes place.

C. The Court's Protection of Corporate Free Speech and Its Importance for Corporate Free Exercise

While the Supreme Court has never held that corporations are entitled to protection under the Free Exercise Clause,[409] the application of the First Amendment to the corporate form is certainly nothing new in its precedent. For individuals, the protections of the First Amendment are safeguarded by due process, and the Court has recognized that no alternative source of protection is necessary when applying the First Amendment to corporations.[410] Moreover, "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."[411] There have also been major strides in this area in recent years. In 2010, the Court decided a landmark case dealing with political speech and the corporate form.[412] As with *Hobby Lobby*, there are significant parallels between the Court's rationale and the argument for recognition of corporate free exercise rights.

The strength of the comparison between corporate free speech and corporate free exercise actually stems from two different cases. The first, *First National Bank v. Bellotti*, was decided in 1978 and held unconstitutional a Massachusetts statute forbidding specified corporations from spending money to influence the outcome of referenda.[413] In so holding, the Court stated the relevant inquiry was not whether corporate rights were coextensive with the individual but whether the law at issue regulated activities the First Amendment was designed to protect.[414] In distinguishing the right sought to be protected from the identity of the

409. Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012).
410. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 (1978).
411. *Id.* at 780 n.15.
412. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
413. *Bellotti*, 435 U.S. at 767.
414. *Id.* at 776.

claimant, the Court found the corporate form did not alter the protection of activities that would otherwise be sheltered by the First Amendment.[415] Over thirty years later, the Court again had occasion to consider the regulation of corporate political speech in *Citizens United v. Federal Election Commission*.[416] The federal statute at issue made it a felony for corporations, including nonprofits, to advocate for the election of any candidate within 30 days of primary elections or 60 days of general elections.[417] The Court struck down the law as an unconstitutional restriction on political speech[418] and expressly upheld *Bellotti*'s insistence that the free speech rights of corporations should not be interpreted differently simply because they are not natural persons.[419] Together, these two precedents provide a solid foundation upon which to base the extension of free exercise to the corporate form.

The analogy between *Citizens United*'s protection of corporate political speech and free exercise was made repeatedly at the circuit court levels in the litigation leading up to the *Hobby Lobby* decision, often as an issue of first impression.[420] By and large, the argument did not have much success. The Tenth Circuit offered some hopeful language, but none of the circuit courts that considered the issue in ACA litigation expressly held that the *Citizens United* rationale should be extended to the Free Exercise Clause.[421] In reality, this is not so surprising since these courts are relying, as they should, on strict interpretations of existing precedent, but these concerns are much less pronounced at the Supreme Court level.

The real concern is the underlying rationale employed by the majority of circuit courts when discussing *Bellotti*, *Citizens United*, and the application of the Free Exercise Clause to corporations. Interestingly, several of the circuit courts place an unjustified amount of weight on oft-quoted dicta contained in a *Bellotti* footnote discussing the notion of "purely personal" rights not provided to corporations such as the privilege against self-incrimination.[422] Both the Third and D.C. Circuit expressly

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415. *Id.* at 777–78.

416. *Citizens United*, 558 U.S. at 310.

417. *Id.* at 337.

418. *Id.* at 372.

419. *Id.* at 343.

420. *See supra* note 381.

421. *See* Korte v. Sebelius, 735 F.3d 654, 682 (7th Cir. 2013); Gilardi v. U.S. Dep't of Health and Human Servs., 733 F.3d 1208, 1212–14 (D.C. Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618, 627–28 (6th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health and Human Servs., 724 F.3d 377, 383–85 (3d Cir. 2013); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134–35 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

422. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Corporate identity has been determinative in several decisions denying corporations certain constitutional rights . . . but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws.

relied on this footnote to make their determination about the extension of the Free Exercise Clause to the corporate form. They formulated the standard as whether the right is so purely personal that it cannot be extended to corporations or whether the nature, history, and purpose of the Clause renders it inapplicable to the corporate form.[423] There are two major flaws with reliance on such language. First, *Citizens United*, clearly and explicitly reaffirmed *Bellotti* and its principle "that the Government lacks the power to ban corporations from speaking."[424] The *Citizens United* Court stated *Bellotti's* central principle was that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity."[425] Therefore, relying on a footnote for the proposition that corporate free exercise rights do not exist under the First Amendment *in an opinion that expressly validates* corporate rights of political speech is perplexing.

Second, formulating the question presented as whether the history and purpose of the Free Exercise Clause dictates it should be applied to corporations clearly sets up the argument as a failure. While the corporation is solidly engrained in American law, it certainly was unknown when drafting the First Amendment, and asking whether the history of the Clause supports its application to a modern legal device proves little. Moreover, these courts have largely ignored the "purpose" portion of the *Bellotti* footnote's language and, instead, focused on the lack of precedent on the issue which is obviously quite thin given the willingness of these courts to place so much emphasis on a lone footnote.[426]

Ultimately, the circuit court treatment of the use of these two precedents fails to give consideration to the central tenant of *Bellotti*, reaffirmed in *Citizens United*, that the relevant conduct should be the heart of the inquiry, not the identity of the claimant.[427] The *Citizens United* Court made clear restrictions based on the identity of the speaker are impermissible because the First Amendment protects the *act* of political speech, not a special category of speakers.[428] If "political speech does not lose First Amendment protection 'simply because its source is a corporation,'" what distinction exists to decide free exercise is of lesser

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Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.") (citations omitted).

423. *Gilardi*, 733 F.3d at 1212; *Conestoga Wood*, 724 F.3d at 383–84.

424. *Citizens United*, 558 U.S. at 347.

425. *Id.*

426. *Gilardi*, 733 F.3d at 1213; *Conestoga Wood*, 724 F.3d at 384.

427. *Citizens United*, 558 U.S. at 347; *Bellotti*, 435 U.S. at 783.

428. *Citizens United*, 558 U.S. at 340.

importance based on the same consideration?[429] Our hard won First Amendment rights are not dependent on such economic concerns.[430] The First Amendment Free Speech Clause protects speech, not the speaker, and the Free Exercise Clause should be interpreted to protect the free exercise of religion regardless of the believer's identity. "There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations," and, "[t]he Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection."[431]

Free speech, including political speech, was of such import both to the Founders and the Court that concern for protection of the *right* was the central concern, not the speaker.[432] Similarly, it is the right of free exercise that is the heart of the Free Exercise Clause, not the enumeration of certain practitioners. The Founders likely did not foresee corporations as entities capable of the exercise of religion just as they did not foresee them as valuable sources of political speech, but that is not justification for a reduction in the importance of the First Amendment. If this principle is analyzed alongside the purpose and historical understanding of the Free Exercise Clause, there is good reason to think the analogy between the Court's interpretation of corporate free speech and the argument for corporate free exercise could yield fruitful results. Such a debate, though perhaps of lesser significance than the long overdue reinterpretation of the Court's general free exercise jurisprudence, is nonetheless an important part of the argument for a renewed emphasis on free conscience and the Free Exercise Clause and one that may be seen as a natural extension of the Court's most recent decision in the area.

CONCLUSION

If there is to be a respect for the individual right of free exercise and free conscience more broadly in American society, it must be first resurrected in our modern legal doctrine. The inviolability of generally applicable laws and the increasing disregard of religion's importance in society have caused a steep decline in free exercise protection. Individual conscience today is sacrificed in the name of uniformity and practicality, but these considerations cannot be made to trump the First Amendment. Our Founders did not envision free exercise as an occasional privilege to be balanced with pragmatic concerns. Current free exercise law subordinates religious liberty to judicial efficiency, and the longer this trend goes unchecked, the more difficult it will be to regain what we have lost. Our

429. *Id.* at 342 (quoting *Bellotti*, 435 U.S. at 784).
430. *Id.* at 349–50.
431. *Id.* at 353.
432. *Id.*

excuse may well be that such a movement seemed laudable, progressive, or even necessary. It may be that vigilant and jealous protection of free exercise seems too burdensome. It may also be that when free conscience is left to the grace of the sovereign,[433] such excuses will seem trivial in hindsight.

The historical underpinnings of the Free Exercise Clause and individual liberty of conscience represent more than legal theory. The reverence these rights enjoyed was a result of a more fundamental view of the interplay between government and religion and their respective roles. Professor McConnell surely reflects this idea better than anyone.

> At its very core, the Free Exercise Clause, understood as Madison understood it, reflected a theological position: that God is sovereign. It also reflected a political theory: that government is a subordinate association. The theological and political positions are connected. To recognize the sovereignty of God is to recognize a plurality of authorities and to impress upon government the need for humility and restraint. To deny that the government has an obligation to defer, where possible, to the dictates of religious conscience is to deny that there could be anything like "God" that could have a superior claim on the allegiance of the citizens—to assert that government is, in principle, the ultimate authority. Those are propositions that few Americans, today or in 1789, could accept.[434]

While many will disagree, as is their right, about whether this is the way our society should continue to view free exercise today, there is no dispute about the veracity of this characterization from a historical perspective. Any other construction requires a willful decision to ignore the rich religious history of our nation. Such a decision can be reached in the name of modernity and progressivism, but that choice transfers ownership of conscience to society and its government just as surely as it takes it away from the individual, and there are still many people who would not make such a bargain.

433. Underkuffler-Freund, *supra* note 5, at 968.
434. McConnell, *Revisionism*, *supra* note 59, at 1152 (footnote omitted).